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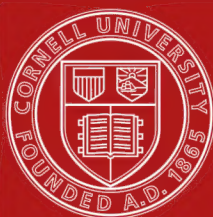
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**A commentary on the law of contracts /**



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A COMMENTARY  
ON THE  
LAW OF CONTRACTS.

BY  
FRANCIS WHARTON, LL.D.,  
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AND ON CRIMINAL LAW.

IN TWO VOLUMES.

VOLUME I.

PHILADELPHIA :  
KAY AND BROTHER,  
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1882.



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## PREFACE.

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FOR several reasons the older English text-books on contracts, and the American treatises based on them, have ceased to represent the actual state of the law in England and in this country.

1. Recent English legislation has to a large measure assimilated the doctrines of common law to those of equity, and has committed to a common judiciary the administration of both branches of jurisprudence. The older English rulings, therefore, so far as they were based on a system now abrogated, are no longer authoritative in England;<sup>1</sup> while in most of our states they have not, so far as they sustained at common law doctrines repudiated in equity, been regarded as at any time authoritative. The recent English rulings, therefore, as embodied in the treatises of Mr. Pollock, Mr. Leake, and Sir W. Anson, are far more in sympathy with our system, as a whole, than are the older English rulings as embodied in the treatises of Mr. Powell and Mr. Chitty. The need, it is true, for such a work as I now offer has been much lessened by the excellent American editions of the treatises of Mr. Pollock and Sir W. Anson. But we should not forget that our jurisprudence, so far as regards these important changes, took the lead of that of England; and

<sup>1</sup> See as applying the rule that, ble as distinguished from common law under the judicature act of 1873, a doctrine, *Walsh v. Lonsdale*, 46 L. T. common law court must adopt equita- N. S. 858 (1882).

that the cases in this country in which these changes are discussed are vastly more numerous, and many of them more carefully considered, than are the cases within the same range in England. It is proper, therefore, that in a work on contracts, American jurisprudence should not at least be postponed to a jurisprudence which, in this relation, is its junior and which has been less elaborately mapped out.

2. The law of contracts being in many of its aspects cosmopolitan, English judges and authors sought, from the earliest times of which we have a record, to discover how contracts were considered in what they called the "civil" law. But for a long time their opportunities of accuracy in this respect were not great. The *Corpus Juris* has only within the last few years been cleared of glosses and interpolations which made some of its most important passages senseless if not erroneous; and the treatise of Gaius, which has proved so valuable in elucidating the text, was only discovered thirty years ago. The foreign jurists who were until within twenty years cited in England were either scholastic casuists speculating on an unreal world, or servile commentators expanding a corrupted text.<sup>1</sup> Now, however, Savigny's great works on contracts and on the Roman law as a system are accessible, in

<sup>1</sup> Of the inadequacy of the older English standards an illustration may be found in the case of *Jordan v. Elliott*, decided by the supreme court of Pennsylvania in March, 1882 (12 Weekly Notes, 56). In the opinion of the court, Blackstone is cited to the effect that fear, to constitute a defence in cases of duress, must be such fear as a person of courage and firmness would be likely to yield to; and Blackstone, in a passage quoted from him, states that the "civil" law took this position. Now, though this was the view of some of the scholastic civilians,

the Roman jurists, so far from this being their opinion, held that, in determining the question whether consent was extorted by fear of violence, the distinctive characteristics of the assailant and of the assailed were to be considered. See *infra*, § 147. And this is the conclusion reached by the supreme court of Pennsylvania in this interesting case, dissenting with evident reluctance from Blackstone in a matter in which Blackstone relied on authorities who misrepresented the Roman law.

## PREFACE.

annotated translations, to bench and bar; and Savigny's conclusions are cited by English judges as the basis of many of their most important decisions, while Mr. Pollock, in a treatise which I think the best that England has given on contracts, when he does not rely on Savigny as final, differs from the great master with hesitancy, making him the basis even for a departure. Yet Savigny is not to be regarded as having settled the multitudinous questions which arise in this branch of jurisprudence. Milton tells us of an

“anarch old

Who by decision more embroiled the affray.”

This, from a fundamental law of thought, must be the case with judges and jurists as well as with “anarchs.” Every new position advanced, no matter how wisely and lucidly, gives rise to multitudes of new distinctions, it being necessary to show how far it affects each new and varying case. This is eminently so with Savigny, whose office it was not to codify but to issue germinal principles to be developed by those who should follow. Of this we have an interesting illustration in a thoughtful German work on contracts recently published,<sup>1</sup> which shows how the tendency of thought with us and that in Germany are unconsciously approximating in this relation. Nothing is more remarkable than the modification, in recent English and American cases, of the doctrine of consideration. For nearly a century it was held that a consideration must be *either* a benefit to the promisor *or* a detriment to the promisee. Gradually, however, it was seen that the first alternative was superfluous, and that no benefit to the promisor was a consideration unless it was a detriment to the promisee. The conclusion, it was true, was not very lucidly expressed; the consideration, it was said, must “flow” from the promisee; but, no matter how the rule

<sup>1</sup> Der Vertrag, von Dr. Siegmund Schlossman, Leipzig, 1876.

was stated, it is now settled. There must be detriment of some kind to the promisee; it may or it may not be that the promisor is benefited by the bargain, but detriment to the promisee there must be. Now it is an interesting fact that this is the conclusion to which Schlossman comes after a copious and subtle discussion, not only of the Roman standards, but of the philosophy of modern jurisprudence. I mention this book in this place because I did not obtain it until my chapter on consideration was in the printer's hands. Other illustrations of the way in which German authorities have recently been invoked to sustain the conclusions of English judges will hereafter be given in detail. It is enough now to say that even if our sole object be to reproduce English jurisprudence, no book on contracts can meet the present need unless it at least gives us what is said by great German commentators now recognized in England as authoritative in the jurisprudence common to Germany and England. We cannot verify English decisions based on German authorities without seeing what it is that these authorities say.

3. I think, also, it is important to take into account the influence exercised on jurisprudence by the kindred science of political economy. Lord Kenyon, who was a tory, based his decision, in *Waddington's case*, that it is illegal to buy up produce on speculation, on the paternal theory of political economy; and he took particular pains to condemn the theory of *laissez faire*, announcing that he held Adam Smith's doctrines in this respect to have been satisfactorily refuted.<sup>1</sup> Lord Campbell, a liberal, and upholder of the theory of *laissez faire*, held just the opposite, arguing that freedom to bargain is a right with which government, except in cases

<sup>1</sup> See Lord Kenyon's opinion in *R. v. Waddington*, 1 East, 143 *et seq.*, and discussion in *Criminal Law Magazine* for Jan. 1882.



of necessity, ought not to interfere.<sup>1</sup>—It is on this important issue that we find one of the most marked contrasts between the tendency of recent English and that of recent American adjudication. In England free trade principles (although the recent Irish land bill is a striking exception) are dominant, and this is to be seen not only in the repudiation of the old rulings as to forestalling and regrating, but in the assigning of almost unchecked liberty to the right to contract. In this country, on the other hand, free trade principles (whether rightly or wrongly it is not within the province of the present work to consider) have at least not been accepted as part of the national creed; and we find as a result numerous decisions of our courts restricting freedom of contract. Not only is it held in almost all our states, and by the federal courts, that agreements to release from liability for negligence are invalid though couched in terms which would be legal in England,<sup>2</sup> but our courts have decided that agreements to fix the price of labor,<sup>3</sup> agreements to control transportation,<sup>4</sup> and agreements to absorb a staple,<sup>5</sup> are invalid, although similar agreements have been sanctioned in England. It is enough, in order to explain the large space which these and cognate rulings occupy in the present work, to say that they are not only distinctively American, but that they peculiarly demand accurate and prominent statement and classification. If public policy is to determine whether contracts are valid or otherwise, it is important that public policy should be clearly defined.<sup>6</sup>

4. One other distinctive feature of our American jurisprudence—a feature which each day becomes more marked—is its copious minuteness of differentiation. An English critic has

<sup>1</sup> *Hilton v. Eckersley*, 6 E. & B. 62.

<sup>5</sup> *Infra*, § 442.

<sup>2</sup> *Infra*, § 438.

<sup>6</sup> As to constitutionality of such legislation, see *infra*, § 1064.

<sup>3</sup> *Infra*, § 439.

<sup>4</sup> *Infra*, § 442 a.

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complained of the multitudinous mass of citations in my other works. I do not see how this can be avoided. There is no state in the Union in which a student is not entitled to know the cases decided on any given topic by the court by whose law he is bound ; and in addition to the federal reports, of which we have at least twelve volumes issuing annually, we have annual reports from thirty-eight states. But there is another reason for the citation of all the cases from each state bearing on each point discussed. The more extended the induction, the more satisfactory is the conclusion reached ; and, independently of this reason, each new case, especially where new conditions of society intervene, gives a new phase in which the doctrine at issue may be tested. My duty, in the preparation of my other works, has required me to carefully examine for the last few years the reports of all our courts ; and from these volumes I have noted whatever bears on the points discussed in the following pages. In some of these reports will be found opinions in which the questions at issue are discussed with an ability at least equal to that of contemporaneous English judgments. But be this as it may, there is no state the decisions of whose supreme judiciary should not be cited in a work professing to aid practitioners and students in the United States. And this citation is what I have here undertaken to give.

My particular acknowledgments are due to John Douglass Brown, Jr., Esq., of the Philadelphia bar, for valuable aid received from him in verification and correction for the press. If the cases cited are uniformly accurate, as I believe will be found to be the case, it will be largely due to his conscientious diligence. I desire, also, to express my indebtedness to Professor L. von Bar, of Göttingen, one of my colleagues in the Institute of International Law, not merely

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for his admirable printed expositions of several of the topics I here discuss, but for the suggestions as to authorities he has been kind enough to give me in our private correspondence.

F. W.

NARRAGANSETT PIER, R. I.,

Sept. 24, 1882.



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§§ 1061-1071.

## ADDENDA ET CORRIGENDA.

Vol. I., page 199, at end of note 5, *add* :—

Jordan *v.* Elliott, 12 Weekly Notes, 56.

“ 493, 10th line, *for* “selling,” *read* “delivering.”

“ 552, at end of note 1, *add* :—

Dexter *v.* Snow, 12 Cush. 594; Tuxbury *v.* Miller, 19  
Johns. 311.

“ 623, at end of note 5, *add* :—

See Conly *v.* Hillegas, 94 Penn. St. 132.

“ 736, strike out “that” at beginning of first line.

“ 793, last two lines of § 594, change “in favor of” to “against,”  
and “former” to “latter.”

[For volume II. see beginning of that volume.]





# CONTRACTS.

## CHAPTER I.

### CONSTITUENTS OF CONTRACT. PROPOSAL AND ACCEPTANCE.

A contract is an interchange of legal rights, § 1.	If not accepted within designated limits as to time and place, proposal falls, § 15.
Parties must be both bound, § 2.	Proposal and acceptance may be conditional, § 16.
Terms used must be susceptible of definite construction, § 3.	So of subscriptions to joint enterprises, § 16 <i>a</i> .
Concurrence must be as to the same thing, § 4.	Acceptance must be communicated when required, § 17.
Provisional concurrence not to be treated as final, § 5.	Agreement to be bound on mere posting of acceptance may be implied, § 18.
Contract may be by conduct, § 6.	Rule depends on terms of proposal, § 19.
Acceptance of services or goods may amount to a contract to pay for them, § 7.	Place of acceptance is place of contract, § 20.
Contracts resolvable into proposal and acceptance, § 8.	Time of acceptance is time of contract, § 21.
Proposal not to bind beyond reasonable time, § 9.	Assent must be definite; mere non-refusal is not enough, § 22.
When rejected a proposal is exhausted, § 9 <i>a</i> .	Grants under seal may bind grantor without communication to grantee, § 23.
Until accepted a proposal may be revoked, but not afterwards, § 10.	General proposal binds as to all parties taking action in conformity with its terms, § 24.
Revocation requires notice brought home to party addressed, § 11.	So of railway time tables, § 25.
Except in case of proposer's death or insanity, § 12.	So of letters of credit and promises to accept bills, § 25 <i>a</i> .
Proposer may bind himself to keep open proposal to specific date, § 13.	
Proposal not binding if not continuous, § 14.	

So of auction sales, § 25 b.

From general proposals are to be distinguished bids for customers, § 26.

Telegrams may constitute a contract, § 27.

"Voidable" distinguished from "void," § 28.

§ 1. A CONTRACT is an interchange by agreement of legal rights. It must be an interchange, involving the assent of two or more persons. It must be by agreement; a mere intimation of purpose is not sufficient. It must have legal rights as its object. An agreement between A. and B. to respect each other is not a contract;<sup>1</sup> nor is an agreement between A. and B. to commit a

A contract is an interchange of legal rights.

<sup>1</sup> *Infra*, §§ 8, 588. Anson on Cont. 14; citing Roll. Ab. 8; Gutling v. Lynn, 2 B. & Ad. 232; Taylor v. Brewer, 1 M. & S. 290. In Taylor v. Brewer the agreement was to do services for whatever remuneration should be deemed right. This was held to be a mere engagement of honor.

Chief Justice Marshall (Sturges v. Crowninshield, 4 Wheat. 196) defines a contract as "an agreement in which a party undertakes to do or not to do a particular thing;" Blackstone makes it "an agreement, on sufficient consideration, to do or not to do a particular thing." 2 Black. Com. 446.

In L. 1, § 2 D. de pact. (2, 14) we have the following: "Et est pactio duorum pluriumve in idem placitum consensus."

The German code (Allg. Landrecht, I. 5, § 1) defines a contract to be a reciprocal assent to the acquisition or alienation of a right.

In Koch's Forderungen, § 69, a contract is defined to be a reciprocal express agreement of two or more persons for the establishment or the surrender of a legal relation between them.

Savigny defines a contract (iii. 309) as the union of two or more persons in a common expression of will, by which their legal relations are determined;

"die Vereinigung mehrerer zu einer übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden." Hence marriage and adoption are included by him among contracts, in distinction from those older jurists who limited the term to obligatory engagements.

Kant takes a much narrower view, defining a contract to be the united will of two persons for the transfer of property. (Metaphysische Anfangsgründe der Rechtslehre, pp. 98-103.) Property he defines in the Roman sense, as dominion over a specific thing. Within this definition he comprehends not only contracts of service, but contracts of sale and of exchange. At the same time he regards marriage as a contract, holding that each person in marriage has a lien on the other (ein auf dingliche Art persönliches Recht), and that *copula carnis* is to be regarded as equivalent to tradition. Marriage with him is, therefore, an obligatory contract, which he defines to be "the union of two persons of different sexes for reciprocal sexual possession for life; die Verbindung zweier Personen verschiedenen Geschlechts zum lebenswichtigen wechselseitigen Besitz ihrer Geschlechtseigenschaften."

Hegel, like Kant, apparently treats

crime a contract. The agreement, to be a contract, must concern a right whose transfer the law will compel. It must

the term contract as limited to transfer of property (*Grundlinien der Philosophie des Rechts*, § 71); but this coincidence of opinion is only nominal, as he regards the individual action of a person as a thing, which may be the object of alienation. His view, therefore, is substantially the same as that of Savigny; though he refuses to regard marriage and treaties as contracts. Savigny coincides with Kant in holding marriage to be a contract, and makes the contract to consist in the reciprocal promises of marital cohabitation and support in general, rejecting Kant's sexual limitation.

Windscheid, who will be constantly quoted in the following pages as one of the most reliable of German commentators, defines (§ 305) a contract as consisting in the union of two declarations of intentions (*der Vereinigung zweier Willenserklärungen*). The declaration of one party is to the effect that he will be a debtor to the other party, subjecting his will to the will of the other party; the declaration of the other party is that he accepts this subjection. The one party, in other words, is to perform a certain service; the other to accept this service. It makes no matter, he proceeds to say, which of these declarations has precedence.

Mr. Pollock (3d ed. 1) defines an agreement as "an act in the law whereby two or more persons declare their consent as to any act or thing to be done or performed by some or one of these persons for the use of the others or other of them." "It must be concerned," he adds, "with duties and rights which can be dealt with by a court of justice." It therefore excludes "an appointment between two friends to go out for a walk or to read a book

together;" for this is "not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones." This is covered by the definition in the text that a contract is an interchange by agreement of *legal rights*. As illustrating an interchange of courtesies that do not amount to an interchange of legal rights, see *Potter v. Carpenter*, 76 N. Y. 157.

The Indian contract act of 1872 gives the following definitions, following, in the main, Savigny:—

"(a) When one person signifies to another his willingness to do or abstain from doing anything, with a view of obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

(c) The person making the proposal is called the 'promisor,' the person accepting the proposal is called the promisee.

(d) When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

(e) Every promise, and every set of promises forming the consideration of each other, is an agreement.

(f) Promises which form the consideration, or part of the consideration for each other, are called reciprocal promises.

(g) An agreement not enforceable by law is said to be void.

consist, not merely of loose talk, but of a business proposal and acceptance bearing on a specific act.

(h) An agreement enforceable by law is a contract.

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."

Of the above, the subsections down to (e) may be accepted as giving a succinct and accurate statement of the law. The subsection marked (e) is imperfectly expressed; it would have been better to have said: "Promises made in consideration of each other form an agreement." An agreement is not constituted by a unilateral promise. The distinction taken between void and voidable agreements—the term contract being reserved for agreements which are enforceable at law by one or both parties—is one which will be generally accepted; and of this Mr. Pollock remarks that it is "a clear improvement, for it makes the legal meaning of the words more precise and convenient, without doing violence to former or even to popular usage." The language of subsections (g) and (j), he adds, "is not exactly applicable to English law," and this observation he extends "in some cases to subsection (i) also." To sustain this he refers to agreements of imperfect obligation which are not enforceable by law, yet are not void. To this it may be added that there are few agreements which are not enforceable by the laws of some country, and that there are few agreements, therefore, which,

though not enforceable with us, may not be enforceable somewhere else. To say that void agreements are agreements which can be nowhere enforced would leave us no void agreements to speak of. To say that all agreements not enforceable with us are void would be untrue. On many such agreements parties may be held in other countries.

Koch, following the Roman law, divides contracts as follows:—<sup>1</sup>

#### I. AS TO THEIR WORKING.

(1) *Unilateral and bilateral (unilaterales and bilaterales)*. This distinction is based, not upon the way in which the contract is formed, since in this respect there is no contract that is not bilateral, but upon its effect. If only one obligation springs from it, it is unilateral. According to the old Roman law, an obligation is in form unilateral when one party is creditor and the other debtor, so that by only one of them can a suit be maintained (*actio directa*), the other party being limited to set-off, or *actio contraria*. A bilateral contract, therefore, is in this view the fusion of two obligations, the performance of the one being conditioned on the performance of the other. Each party can on such a contract sue the other in an *actio directa*.

(2) *Onerous and lucrative*. A lucrative contract is one which brings pecuniary benefit to one party alone. An onerous contract is one in which each party gains something and parts with something. Onerous contracts are, therefore, in the main, convertible with bilateral. But lucrative contracts are not convertible with unilateral, since there are unilateral con-

<sup>1</sup> Koch, Ford. § 69.

§ 2. The parties to a contract, therefore, must be both bound. Supposing that one promises in

Parties  
must be  
both bound

tracts which are not necessarily lucrative.

(3) *Conventiones juris civilis* and *juris gentium*. "Pactio aut legitime aut juris gentium," L. 5, pr. D. de pact. (2-14). This division relates to the system of law on which the contract rests, and to which recourse must be made for its enforcement. In the same way we may speak of contracts good in law, and contracts good in equity; and of contracts for which distinctive statutory remedies are provided (*e. g.*, deeds duly acknowledged and recorded), and contracts for which there is no distinctive statutory remedy.

(4) *In bonæ fidei* and *stricti juris contractus*. This is a processual distinction. Contracts *ex jure gentium* are not necessarily *bonæ fidei contractus*.

Koch's second division is as follows :  
II. AS TO MODE OF FORMATION.

Contracts in this respect are divided into real, verbal, literal, and consensual. The Roman system prescribed certain forms as essential to the validity of contracts, on the same principle as is adopted by our statute of frauds in reference to certain classes of contracts. But outside of these forms there were two other modes by which parties could bind themselves. These were by performance on one side, and by a privilege attached to certain single specified contracts which were valid without form. The reasons given for requiring specific forms to be adopted were the dangers of fraud, and the necessity of precision in a transaction by which the will of one person is subjected to the will of another person. These forms were of two kinds—oral and written—*verba, literæ; verborum, literarum obligatio*. Of oral contracts there were two kinds: *nexus* and *stipulation*. Real contracts

(*re contracta obligatio*) were contracts which were not embraced within either of the classes above mentioned, but which had been performed on the one side. The special contracts, which were privileged without form (*consensu contracta obligatio*, consensual contract), were four: *emptio venditio, locatio conductio, societas*, and *mandatum*. The reason was that contracts of sales and of service were so numerous, and related often to transactions so trivial, that it would be inconvenient and oppressive to require them to be executed in the form of the stipulation. *Societas* and *mandat* were excepted as being virtually real contracts, not existing until there was on one side or the other something in the way of part performance.

The normal form was the oral, and in the old law took the name of *nexus* (Koch, 2, p. 61). Five witnesses and a *libripens* were essential to perfect the transaction, which symbolized a weighing of gold and then a loan of the gold weighed. The creditor then asked the debtor whether he had received the gold, to which question the debtor replied, acknowledging the receipt and the debt. Of later introduction was the stipulation, in which there were no scales or specified attesting witnesses. The essence of the stipulation was that when the parties met, the one (the stipulator) should ask whether the other agreed, upon which the other (the promisor) answered. No fixed words were prescribed; the only requisite was that the answer should apply exactly to the question. The form "*spondes*," "*spondeo*," however, which in prior times was essential to the *nexus*, was always regarded as valid when used in the stipulation. But no form of words

consideration of the promise of the other, the one is not bound unless the other is bound.<sup>1</sup> A promise to do a thing on an executed consideration is not a contract;<sup>2</sup> nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side.<sup>3</sup> Without this reciprocal obligation, no contract can be constituted.<sup>4</sup> "It is a general principle," says Mr. Fry, "that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from difficulty attending its execution in the former."<sup>5</sup> It is said, indeed, that this rule is subject to certain important exceptions, prominent among which, it is alleged, is that of an infant, a party contracting with an infant being bound to the infant, but the infant not being bound to such other contracting party.<sup>6</sup> But this is a mistake. An infant, it is now generally agreed, is bound by his contracts, though they cannot be enforced against him until he is of full age,

was requisite to the validity of the stipulation. All that was required was that there should be a concurrence as to the thing. For a long time the personal presence of the parties was essential. When writing subsequently became a common mode of business, it was held that when a written agreement existed it would be presumed that the forms of the stipulation had been adopted.

It will be seen, therefore, that by the Roman law the great body of contracts (embracing sales and most bailments) required no special form; that special oral contracts, indeed, had to be put in the form of stipulations; but that written special contracts were at least *prima facie* valid.

<sup>1</sup> *Infra*, § 523.

<sup>2</sup> *Infra*, § 514.

<sup>3</sup> *Infra*, § 509 *et seq.*

<sup>4</sup> *Kennaway v. Treleavan*, 5 M. & W. 498; *Arnold v. Poole*, 4 M. & G. 860;

*Lees v. Whitcomb*, 5 Bing. 34; *Head v. Diggon*, 3 Man. & R. 97; *Martin v. Mitchell*, 2 Jac. & W. 413; *Jenness v. Iron Co.*, 53 Me. 20; *Dresel v. Jordan*, 104 Mass. 412; *Keep v. Goodrich*, 12 Johns. 397; *Tucker v. Woods*, 12 Johns. 190. In *Cooke v. Oxley*, 3 T. R. 653, Lord Kenyon said "the other party was not bound: *it was therefore nudum pactum.*" That in promises to marry mutuality is essential, see *Daniel v. Bowles*, 2 C. & P. 553; *Wightman v. Coates*, 15 Mass. 5; *Russell v. Cowles*, 15 Gray, 582; *Waters v. Bristol*, 26 Conn. 398; *Southard v. Rexford*, 6 Cow. 254; *Moritz v. Melhorn*, 13 Penn. St. 334; and other cases cited, 1 Ch. on Con. 11th ed. 22.

<sup>5</sup> Spec. Per. § 286; adopted in *Sturgis v. Galindo*, Sup. Ct. Cal. 1881, 13 Rep. 266.

<sup>6</sup> 1 Ch. on Con. 11th Am. ed. 23.

and although when he arrives at full age they may be repudiated by him.<sup>1</sup> But this is part of the limitation of the contract itself. The contract is binding on him on a contingency, *i. e.*, its non-repudiation at a specified period; and it stands on the same footing, therefore, as sales on trial, and other conditional contracts.<sup>2</sup> It is the very essence, as will be hereafter seen, of a conditional promise that it is limited on an uncertainty;<sup>3</sup> and here the uncertainty is non-repudiation at majority. It is also said that exceptions to the rule requiring mutuality are to be found in cases where one of the parties is defrauded, in cases where one of the parties can defend under the statute of frauds, and in cases where an agent turns out to be acting for a principal subsequently disclosed. But in all these cases the question of liability is raised by confession and avoidance; and if we are to hold that there is no contract in such cases, we must hold that there is no contract in any case in which one of the parties could interpose a good defence, no matter what that defence may be. In all these cases, also, the ratification (or non-repudiation, as it is more properly called)<sup>4</sup> does not start a new contract; it merely confirms a contract already existing.<sup>5</sup> In respect to contracts declared void on account of essential error, it may be said that the party who was under no mistake is bound, while the mistaken party is relieved. The answer to this, however, is, that the vacating as to one party vacates as to the other, as the consideration fails.<sup>6</sup> The rule requiring mutuality is, not that the contract should bind in defiance of fraud, or of equities subsequently arising between the parties, but that each party should agree to perform his part. It may be that this part is to be performed only on a contingency. It may be that there is a failure of consideration, so that specific performance cannot be compelled.<sup>7</sup> It may be that some insuperable obstacle may be afterwards interposed in the way of performance.<sup>8</sup> But be this as it may, there must be mutuality when the contract is made,

<sup>1</sup> *Infra*, § 32.

<sup>2</sup> *Infra*, § 16, and see generally *infra*, § 545.

<sup>3</sup> *Infra*, § 546.

<sup>4</sup> See *infra*, §§ 56 *et seq.*

<sup>5</sup> See *infra*, §§ 283-4.

<sup>6</sup> *Infra*, §§ 493 *et seq.*

<sup>7</sup> *Infra*, § 520.

<sup>8</sup> *Infra*, §§ 296 *et seq.*

and this mutuality is essential to the making of the contract. A more difficult exception to deal with arises in cases of contracts with married women. A married woman may be incapable of contracting in a general sense of the term, and if she makes a contract for the purchase of real estate, that contract cannot be enforced against her, though if the contract be executed by her, it has been held that she may have a remedy against the other party.<sup>1</sup> Now, in the first place, it does not follow that, because specific performance is refused in a particular line of cases, in such cases there is no contract. Specific performance is refused in many cases of contractual hardship in which a party can avail himself of the contractual relation in a court of law. And in the second place, a married woman, though technically unable to contract, may yet preclude herself by estoppel at least from fraudulently asserting title against a third party who is encouraged by her to buy a property to which she has a title, which she at the time knowingly suppresses.<sup>2</sup> But, thirdly, and this is the best reason, after the married woman pays for and takes the property thus purchased by her, the vendor is himself estopped from denying her capacity. On the other hand, however, if we concede that she cannot be estopped, and that she has no contractual capacity whatever, then we must hold, in accordance with the great preponderance of authority, that there is no contract, and that where there is no contract the other party is not contractually bound. He may be bound for negligence, or for deceit, but he cannot be bound on a contract.<sup>3</sup>

§ 3. It is not necessary that all the terms in a contract should be free from ambiguity. If it were, no contract could be framed, since it is impossible to use terms which are entirely free from doubt. All that is required is that the contract, as drawn from proposal and acceptance, should be susceptible of definite construction.<sup>4</sup> It may be necessary for this purpose, when the obscurities are latent, to prove the intention of the

Terms  
must be  
susceptible  
of definite  
construction.

<sup>1</sup> *Chamberlain v. Robertson*, 31 Iowa, 410; *Neef v. Redmon*, S. C. Mo. 1881, 176.

13 Rep. 434, cited *infra*, § 89.

<sup>2</sup> See *infra*, § 89.

<sup>3</sup> See *Vance v. Nogle*, 70 Penn. St. 176.

<sup>4</sup> As to interpretation and construction, see *infra*, §§ 627 *et seq.*



parties, either by showing the business usage to which they may be supposed to have adapted themselves, or by showing what was the meaning they themselves attached to the terms employed, or by putting in evidence extrinsic facts explaining obscure terms.<sup>1</sup> To constitute a valid contract, however, there must be proved an agreement to which can be assigned a definite contractual force. Whether the bargain be or be not in writing, it cannot, if its terms are hopelessly ambiguous, be executed by the courts. In other words, a contract will not be executed unless its terms are certain and its enforcement practicable.<sup>2</sup> But a party to whose fault an

<sup>1</sup> Wh. on Ev. §§ 920 *et seq.*; *infra*, § 646.

<sup>2</sup> Bispham's Eq. § 377; Fry on Spec. Perf. §§ 203, 229; Walpole v. Orford, 3 Ves. 420; Pearce v. Watts, L. R. 20 Eq. 492; Colson v. Thompson, 2 Wheat. 336; Marble Co. v. Ripley, 10 Wal. 339; Ewins v. Gordon, 49 N. H. 444; Bruce v. Bishop, 43 Vt. 161; Thruston v. Thornton, 1 Cush. 89; Dodd v. Seymour, 21 Conn. 476; Benedict v. Lynch, 1 Johns. Ch. 370; Buckmaster v. Thompson, 36 N. Y. 558; Whittlesey v. Delaney, 73 N. Y. 571; King v. Ruckman, 5 C. E. Green, 316; Meason v. Kaine, 63 Penn. St. 340; Sutherland v. Parkins, 75 Ill. 338; Baldwin v. Kerlin, 46 Ind. 426; Munsell v. Loree, 21 Mich. 491; Aday v. Echols, 18 Ala. 353; Thompson v. Ray, 46 Ala. 224; Huff v. Shepard, 58 Mo. 242. As to construction, see *infra*, §§ 641 *et seq.*

In Guthing v. Lynn, 2 B. & Ad. 232, an agreement, collateral to the purchase of a horse, that "if the horse was lucky" the vendee "would give £5 more or the buying of another horse," was held to be too vague to be legally enforced. In Donnison v. Café Co., 45 L. T. N. S. 187, the evidence was, that, the plaintiff being the lessee of vaults in the city of London under a lease granted by the corporation of

London, the defendants entered into a negotiation for the purchase of the lease. The defendant's secretary wrote to the agents of the plaintiff a letter, in which he said that the directors thereby offered to purchase the vaults for £2500 cash, and to take over a mortgage for £3500 on the lease, these terms to include the lease, goodwill, fixtures, etc. The plaintiff's agents answered as follows: "In reply to your letter of the 7th instant, we are now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants claiming damages for breach of contract. Malins, V. C., held that the letters contained a binding contract between the parties. It was held by the court of appeal on June 22, 1881 (Jessel, M. R., Bagallay, L. J., and Lush, L. J., reversing the decision of Malins, V. C.), that no binding contract had been entered into: first, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the statute of frauds; and secondly, because the letters mentioned only what was the property to be purchased and the price

ambiguity is imputable must bear the construction less favorable to himself, if otherwise equitable.<sup>1</sup> And the sense in

to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. "The only point, really," said Jessel, M. R., "that we have to decide is whether there is any contract. It is said to be contained in two letters. In my opinion there is no contract, and for two reasons: one is that neither the name nor sufficient description of the vendor was given; the other that there was no acceptance free from conditions. There is a mere conditional acceptance, and not a complete clear acceptance. As regards the first point, there is no possible acceptance. The auctioneer only says, 'We are instructed to dispose of property; our instructions are to sell.' That does not show that the person who is selling is the owner, or proprietor, which is the same thing. He may be a person having a power to dispose of the property, or what is sometimes called a power simply collateral without any interest in the property.

"Now the other point I should like to say a word upon, because the cases have laid down this distinction, that, where all the terms of the contract are defined and settled, then the merely saying there shall be a formal contract does not prevent specific performance. It is mere form. But where it is intended that all the terms of the contract shall not be treated as settled, but other terms are intended to be inserted in what is called the formal contract, then of course there is no

contract until what is called the formal contract is signed, as I have expressed it. All we have is this: certain terms are agreed upon subject to such further terms as may be agreed upon. Now, what is intended by the parties must be ascertained from the documents themselves, and from the surrounding circumstances. It does not depend on a nice verbal criticism, but the court is to ascertain the meaning of the letters as it ascertains the meaning of any other documents, and according to the same rules of construction. In this case we have the following circumstances: An auctioneer is selling property by private contract; he offers that property for sale; he gets an offer back for the price, and he states what are the particulars of the property. He writes, 'In reply to your letter of the 7th inst. we are now instructed'—although it is 'we' the letter is signed by Frederick Clark—'to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitors.' What does he mean? Does he mean the solicitor is not to put any other term into the contract, but it is to be an open contract with no given price, no stipulation as to title, no day fixed, no other term introduced; or does he mean to say, 'We have settled the price and description of the property, and the other usual terms will be settled by the solicitor who will send you a contract?' I have no doubt the second is the proper interpretation of the letter—that he did not intend to bind his client to an open contract without any safeguard as to title to be furnished, or

<sup>1</sup> *Infra*, § 670; *Prichard v. Ovey*, L. J. & W. 396; *Kensington v. Phillips*, 5 Dow, 61.

which the proposer knew that the acceptor accepted the proposal, is the sense that is to prevail.<sup>1</sup>—Notwithstanding some vacillation in the earlier cases, it is now settled that in contracts of sale, either the price must be specified, or the means of determining the price given.<sup>2</sup> Hence it was properly held in Michigan, in 1880, that an inquiry by V. as to how much P. & Co. were paying for a particular article, and an answer that they would take all that he could deliver at a certain price, does not constitute a contract without a further agreement to act on P. & Co.'s order, so that the price and quantity could be definitely fixed.<sup>3</sup> But it was subsequently held in the same state, that a proposal by A., "that, if the city would build one half of a good bridge, he would build the other half," constituted, when accepted by the city, a definite

any time being mentioned as to completion, this being not only a lease, but the sale of a goodwill in a business; but what he did mean was, 'We have settled the two main terms, namely, the property to be sold and the price to be paid for it. The other terms, which are to some extent formal and usual, and which to a great extent must be the subject of special agreement, must be settled by the solicitor.' I think there is no contract on that ground, and I am bound to say there is no contract on the subsequent letters."

In *Miller v. Kendig*, 55 Iowa, 174, it was held that a contract in which the grantee agreed to account to his grantor for the proceeds of certain land above the price paid by him above "a reasonable amount" was not void for uncertainty.

In *Lincoln v. Ins. Co.*, Sup. C. Mass. 1882, 13 Rep. 399, the telegrams on which the alleged contract was based were as follows: From the plaintiff to the defendant, "Telegraph how much corn you will sell, with lowest cash price, Buffalo." From defendant to plaintiff, "Three thousand cases, one dollar five cents, open one week."

From plaintiff to defendant, "Sold corn; will see you to-morrow." The defendant was a corporation in New York, the plaintiff a broker and dealer in Boston. It was held that the telegrams did not contain any offer by defendants to sell to the plaintiff. The plaintiff, so it was said by the court, was a broker, and had acted as a broker for the defendants, and also had dealings with them on his own account. "Construing the first two telegrams together, the defendants say to the plaintiff that they will sell a certain quantity of corn, on certain terms, and within a certain time; but they do not say that they will sell to the plaintiff. They say in effect that they will hold the corn for a week, for the plaintiff to find a purchaser. The plaintiff's reply confirms this construction, for he does not say that he will take the corn, but that he has sold it, and will see the defendants the next day."

<sup>1</sup> *Infra*, § 657.

<sup>2</sup> *Benj. on Sales*, 3d Am. ed. § 89; *Flagg v. Mann*, 2 Sumn. 538; *Fuller v. Bean*, 34 N. H. 304.

<sup>3</sup> *Ahearn v. Ayers*, 38 Mich. 692.

contract on which A. could be sued.<sup>1</sup>—It is sufficient, if property to be passed be described in general terms; and these terms can be explained and applied by parol proof.<sup>2</sup> Thus, in a case before the English Court of Appeals in 1881, it was held, that a receipt given by an auctioneer at a sale of real estate, as follows: “Received of Mr. S., the sum of £21 as deposit on property purchased at £420 at Sun Inn, Plaxton, on the above date, Mr. C. Pinxton, owner. Received by H. M., 29th March, 1880, H. M.,” taken in connection with the following memorandum: “The property duly sold to Mr. S., butcher, Pinxton, and deposit paid at the close of sale. H. M., auctioneer,”—constituted, when explained by parol proof, a binding contract, even under the statute of frauds.<sup>3</sup> “I agree,” said Jessel, M. R., “that the word ‘property’ alone is vague. But the word is well understood. In a conveyance by a debtor for the benefit of his creditors the words used are ‘all the property.’ There is sometimes a contest, but there is never any doubt that parol evidence may be admitted to show what was part of that property. There is nothing requiring the description to be an inseparable incident. The words ‘all the property’ immediately throw open an inquiry into the matter. As regards separable incidents, has anybody ever doubted that a sale of ‘all that farm, in the tenancy of C., formerly bequeathed by A. to B.,’ shows a sufficient description? Nobody ever doubted it. I have seen these words, ‘All that land formerly in the occupation of B. and now of —,’ and that is quite sufficient. Those who are old enough may remember that in the form used in a common recovery, very general words were used. They were quite sufficient as a description, although outside evidence was required to show what property passed. There is no such general rule as the learned judge in the court below supposed. It does not follow that, because some general words are used, the description is insufficient. The learned judge in the court below says: ‘Suppose, for example, the vendor were to say, I sold, at the Sun Inn, a certain house, certain plans, certain loose materials

<sup>1</sup> *Long v. Battle Creek*, 39 Mich. 323. App. 1881; Jessel, M. R., Baggallay, L.

<sup>2</sup> *Infra*, § 661. J., Lush, L. J., reversing Kay, J., in

<sup>3</sup> *Shardlow v. Cotterell*, Eng. Ct. of s. c. L. R. 18 Ch. D. 280.

on the ground, and I say what I sold were all these things; and he gives a list.' If the words used in the case put by the learned judge were in a will, they would be sufficient to pass the property. When he says, 'You must have, on the face of the contract, a sufficiently definite description of the things sold to enable you to introduce parol evidence to show what the articles were to which that description refers,' I agree entirely. 'But,' the learned judge continues, 'a mere description of the thing sold as 'property' is not, to my mind, sufficiently definite to enable any such parol evidence to be adduced.' The error he makes there is, taking the word 'property' alone."—In a succeeding chapter it will be seen that the construction of contracts is to be determined by the laws of logic as limited by legal precedent; that while the intention of the parties is to be carried out, the construction most consistent with good faith and legality is to be preferred, and that the whole context, aided by extrinsic facts, may be invoked to determine what the parties meant.<sup>1</sup>

§ 4. There must not only be a concurrence of mind at a particular time, but this concurrence must be as to a particular thing. There must be, to constitute this, as will presently be seen more fully, a proposal squarely assented to. If the proposal be assented to with a qualification, then the qualification must go back to the proposer for his adoption, amendment, or rejection. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract.<sup>2</sup> "A proposal to

Concurrence must be as to the same thing.

<sup>1</sup> See *infra*, §§ 641 *et seq.*

<sup>2</sup> *Hyde v. Wrench*, 3 Beav. 336; *Bateman*, 2 Wood. & M. 359; *Snow v. Miles*, 3 Cliff. 608; *Utley v. Donaldson*, 94 U. S. 29; *National Bank v. Hall*, 101 U. S. 51; *Jenness v. Iron Co.*, 53 Me. 20; *Belfast, etc. R. R. v. Unity*, 62 Me. 148; *Abbott v. Shepard*, 48 N. H. 16; *Bruce v. Bishop*, 43 Vt. 161; *Thruston v. Thornton*, 1 Cush. 89; *Allcott v. Flour Mill*, 9 Cush. 17; *Smith v. Gowdy*, 8 Allen, 566; *Lyman v. Robinson*, 14 Allen, 254; *Rommel v. Wingate*, 103 Mass. 327; *Gowing v. Knowles*, 118 Mass. 232; *Harlow v. Curtis*, 121 Mass. 320; *Ocean Ins. Co.*

accept or acceptance based upon terms varying from those offered, is a rejection of the offer."<sup>1</sup> A variance between the proposal and the acceptance prevents a contract from maturing;<sup>2</sup> and this has been held to be the case where the proposal was to buy with a warranty, and the acceptance to sell without a warranty;<sup>3</sup> where there was a difference as to what the warranty was to be;<sup>4</sup> where the proposal was for "good" barley, and the acceptance was for "fine" barley, there being a material difference between "good" and "fine";<sup>5</sup> where bought and sold notes differed in material points;<sup>6</sup> where there was a material difference between the application for and the allotment of shares.<sup>7</sup> Sending, also, a smaller quantity of goods

*c. Carrington*, 3 Conn. 357; *Crocker v. R. R.*, 24 Conn. 262; *Bruce v. Pearson*, 3 Johns. 534; *Tuttle v. Love*, 7 Johns. 470; *Tucker v. Woods*, 12 Johns. 190; *Barlow v. Scott*, 24 N. Y. 40; *Rittenhouse v. Tel. Co.*, 44 N. Y. 263; *Allis v. Reed*, 45 N. Y. 142; *Demuth v. Am. Inst.*, 75 N. Y. 502; *Potts v. Whitehead*, 5 C. E. Green, 55, 8 C. E. Green, 512; *McKibbin v. Brown*, 1 McCart. 13; s. c. 2 McCart. 498; *Slaymaker v. Irwin*, 4 Whart. 369; *Morrow v. Waltz*, 18 Penn. St. 118; *McKinley v. Watkins*, 13 Ill. 140; *Dana v. Shoot*, 81 Ill. 468; *Maclay v. Harvey*, 90 Ill. 525; *Johnson v. Stephenson*, 26 Mich. 63; *Baker v. Johnson Co.*, 37 Iowa, 189; *North W. Iron Co. v. Meade*, 21 Wis. 474; *McCartney v. Hubbell*, 52 Wis. 361; *Brown v. Rice*, 29 Mo. 322; *Bruner v. Wheaton*, 46 Mo. 363; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Solomon v. Webster*, 4 Col. 335. That the acceptance must be definite, see *infra*, § 22. That an essential error as to the parties or the object precludes a contract, see *infra*, §§ 171 *et seq.* That the minds of the parties must assent "on both sides to one and the same set of terms," see *Chevely v. Fuller*, 13 C. B. 122; *Hazard v. Ins. Co.*, 1 Sumner, 218; *Lyman v. Robinson*,

14 Allen, 242; *Rommel v. Wingate*, 103 Mass. 327; *Hartford, etc., R. R. v. Jackson*, 24 Conn. 514. That in sales error as to identity of things sold avoids, see *infra*, § 186.

<sup>1</sup> *Swayne, J., National Bank v. Hall*, 101 U. S. 51.

<sup>2</sup> *Infra*, §§ 177, 202 *et seq.* 207; *Champion v. Short*, 1 Camp. 53; *Hutchison v. Bowker*, 5 M. & W. 535; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Prop. Eng. Co. v. Arduin*, L. R. 5 H. L. 64; *Andrews v. Garrett*, 6 C. B. (N. S.) 262; *Holland v. Eyre*, 2 Sim. & S. 194; *Addinell's Case*, L. R. 1 Eq. 225; *aff. in H. L. under name of Jackson v. Turquand*, L. R. 4 H. L. 305; *Utleigh v. Donaldson*, 94 U. S. 48; *First Nat. Bank v. Hall*, 101 U. S. 43; *Kyle v. Kavanagh*, 103 Mass. 356.

<sup>3</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597; *infra*, § 186.

<sup>4</sup> *Jordan v. Norton*, 4 M. & W. 155.

<sup>5</sup> *Hutchison v. Bowker*, 5 M. & W. 535; *infra*, §§ 186 *et seq.*

<sup>6</sup> *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737. See, for these illustrations, *Leake*, 2d ed. 30.

<sup>7</sup> *Addinell's Case*, L. R. 1 Eq. 225; *Jackson v. Turquand*, L. R. 4 H. L. 305; *Wynne's Case*, L. R. 8 Ch. 1002; *infra*, § 185.

than ordered, when quantity is material, and on a shorter credit, is not an acceptance corresponding to a proposal;<sup>1</sup> nor is acceptance of goods of a quality materially different from that proposed.<sup>2</sup> On the other hand, if there be an acceptance, the concurrence of minds requisite to make a contract is not prevented by the use by the party assenting of expressions of reluctance or of dissatisfaction.<sup>3</sup> Nor are differences of opinion as to collateral or remote or immaterial matters inconsistent with concurrence on the points the contract is immediately to meet.<sup>4</sup> Nor does the introduction in the assent of comments, provided they are mere surplusage, deprive it of its binding force.<sup>5</sup> Nor does a memorandum attached to the acceptance fixing a time for a formal signature.<sup>6</sup> There must be, in other words, to constitute a contract, a concurrence of the minds of the parties at a given time to a given thing.<sup>7</sup> In old times this concurrence was given in the great majority of cases by parties dealing face to face. Subsequently came in the agent, or *nuntius*, who was charged with delivering and receiving the acceptance of a proposition, and in whom, within such limits, the minds of the parties met and coalesced. Then came the postal service; and as multitudinous business communications are by letter, and as the parties live often at great distances, this coalition of minds does not take place until, in the ordinary course of travel, a letter can be transmitted from the one to the other; but when a proposal is thus transmitted, and when it is accepted, and the acceptance embodied in a reply duly mailed, then, on the putting the acceptance in this formal shape, there is the requisite

<sup>1</sup> *Bruce v. Pearson*, 3 Johns. 534; *Johnson*, L. R. 9 C. P. 158; *infra*, § 190.

<sup>2</sup> *Hutchison v. Bowker*, 5 M. & W. 535; *infra*, §§ 180 *et seq.*

<sup>3</sup> *Pollock*, 3d ed. 39, citing *Joyce v. Swann*, 17 C. B. (N. S.) 84; *Abbott v. Shepard*, 48 N. H. 14.

<sup>4</sup> *Clive v. Beaumont*, 1 De G. & S. 397; *Baines v. Woodfall*, 6 C. B. (N. S.) 657. It is otherwise where material points are left open; *Appleby v.*

*Pollock*, *ut supra*, citing *Gibbins v. Asylum Dist.*, 11 Beav. 1; *English & Foreign Cred. Co. v. Arduin*, L. R. 5 H. L. 64.

<sup>6</sup> *Branson v. Stannard*, 41 L. T. (N. S.) 474.

<sup>7</sup> As to error and mistake, see *infra*, §§ 171 *et seq.* As to interpretation and construction, see *infra*, §§ 627 *et seq.*; *Tilley v. Chicago*, U. S. Sup. Ct. 1881.

coincidence of minds. Now, by the telegraph, and more particularly by the telephone, negotiations, if not face to face, may be made almost instantaneously, mind to mind. But in any case, as will presently be seen more fully, the question whether a reply is in time depends upon the mode of communication. Due business expedition, as we will see, must be employed in forwarding proposal and reply. When, however, the proposition is forwarded and delivered, and the proposer puts himself in communication with his correspondent, then their minds meet, and an acceptance of a proposal thus made is, when forwarded in the way (unless it be otherwise limited in the proposal) business usage prescribes, a contract between the parties. The act of forwarding is the point at which their minds meet.<sup>1</sup>

§ 5. If terms be provisionally agreed to by the parties with the understanding that they are preliminary to a future and fuller contract, then the prior imperfect agreement is regarded as merged in the later and complete document.<sup>2</sup> And where it is part of an acceptance or of a proposal that a written contract is to be framed by the parties, without which the negotiations are to be inoperative, then there is no agreement until this contract is framed. Whether it was intended that the preliminary proceedings should be thus inchoate is to be determined by an examination of the entire negotiations.<sup>3</sup> A tentative scheme is not to be treated as a contract ;<sup>4</sup> and the contract

<sup>1</sup> That a proposal may be continuous, and only take effect on a remote contingency, is illustrated in *Bornstein v. Lans*, 104 Mass. 216. See *Xenos v. Wickham*, L. R. 2 H. L. 296; *Morton v. Burn*, 7 A. & E. 19. As to continuousness of proposal, see *Boston, etc. R. v. Bartlett*, 3 Cush. 224; *infra*, § 14. That a party is not bound by conditions on a railroad ticket printed in such a way as to elude attention, see *Harris v. R. R.*, L. R. 1 Q. B. D. 515; and cases cited *infra*, §§ 22, 438.

<sup>2</sup> Wh. on Ev. § 1014.

<sup>3</sup> *Chinnoek v. Ely*, 4 De G. J. & S.

638; *Adams v. Woodley*, 1 M. & W. 74; *Proprietors Eng. & For. Cred. Co. v. Arduin*, L. R. 5 H. L. 64; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346; *Winn v. Bull*, L. R. 7 Ch. D. 29; *Honeyman v. Marryatt*, 6 H. L. C. 112; *Ridgway v. Wharton*, 6 H. L. C. 238; *Chicago v. Sheldon*, 9 Wall. 50; *Millett v. Marston*, 62 Me. 477; *Real Est. Ins. Co. v. Roessle*, 1 Gray, 336; *Chicago etc. R. R. v. Dana*, 43 N. Y. 240; *Commissioners v. Brown*, 32 N. J. L. 504. See *infra*, § 643.

<sup>4</sup> Wh. on Ev. § 1090, and cases there cited; *Smith v. Webster*, L. R.



is to be regarded as a mere negotiation as long as matters essential to its completion are left undetermined;<sup>1</sup> or as long as it is understood that the terms are not binding until put in writing.<sup>2</sup> But the fact that a more detailed contract is intended, does not deprive articles of agreement of their force;<sup>3</sup> and, when alternatives are presented, one may be accepted and the other rejected.<sup>4</sup>—It is also settled that “a contract may be made by letters, and that the mere reference by them to a future formal contract will not prevent their constituting a binding bargain;”<sup>5</sup> and that the question whether a specific agreement is to have provisional force, or is to be entirely inoperative until formally drafted, depends upon the circumstances of each particular case, being a question of construction when the evidence of the agreement consists of written documents. And whether a particular agreement is provisional or final is to be tested in the same way.<sup>6</sup>

§ 6. Acquiescence by conduct may operate as an acceptance in all cases in which such acquiescence is with knowledge of the facts and is of a nature to imply assent.<sup>7</sup> Thus the reception and retention without objection of a banker's pass-book, returned by the bank, is a

Contract  
may be by  
conduct.

L. R. 3 Ch. D. 49; see *infra*, §§ 643 *et seq.*; *Rossiter v. Miller*, L. R. 5 Ch. D. 648; 3 App. Cas. 1124.

<sup>1</sup> *Infra*, §§ 644 *et seq.* 646; *Brown v. R. R.*, 44 N. Y. 79; *Appleby v. Johnson*, L. R. 9 C. P. 158.

<sup>2</sup> *Ridgway v. Wharton*, 6 H. L. C. 305, by Lord Wensleydale; *Maitland v. Wilcox*, 17 Penn. St. 231; *Brown v. Finney*, 53 Penn. St. 373; *Fredericks v. Fasnacht*, 30 La. An. pt. i. p. 117.

<sup>3</sup> *Thomas v. Dering*, 1 Keen, 729, and cases cited *infra*, § 645.

<sup>4</sup> *Infra*, §§ 619 *et seq.*

<sup>5</sup> *James, L. J.*, in *Bonnewell v. Jenkins*, L. R. 8 Ch. D. 70, 73.

<sup>6</sup> *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268; *Rossiter v. Miller*, L. R. 3 App. Cas. 1124, 1152; *Winn v. Bull*, L. R. 7 Ch. D. 29; *Lewis v. Brass*, L. R. 3 Q. B. D. 667, and cases cited *infra*,

§ 645. “The tendency of recent authorities,” says Mr. Pollock, 3d ed. 41, citing the above cases, “is to discourage any fixed rule or canon as governing these cases.” “It is not to be supposed,” he says, adopting Lord Cranworth's words in *Ridgway v. Wharton*, 6 H. L. C. 264, “because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that the agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.” See *infra*, §§ 644–5.

<sup>7</sup> As to implied contracts, see *infra*, §§ 707 *et seq.*; see also *Bigelow on Estop.* 3d ed. pp. 476, etc.

*prima facie* approval by the depositor of the account contained in the book;<sup>1</sup> and an invoice makes a *prima facie* case against a business man who receives and retains it without dissent.<sup>2</sup> Admission by silence, also, as well as admission by speech, may have a contractual force, and may bind as effectually as may words.<sup>3</sup> When such silent admissions so operate as to put the actor in a specific attitude to other persons by which such other persons are induced to do or omit to do a particular thing, then he is estopped from subsequently denying that he occupied such position, and is compelled to make good any losses which such other parties may have sustained by his course in this relation.<sup>4</sup>—The proposal, as well as the assent, may be by conduct without words.<sup>5</sup> He who takes his seat in a railway car binds himself to pay fare;<sup>6</sup> he who takes a book at a book-stall out of a parcel marked with a particular price, binds himself to pay that price and the bookseller to sell at that price though no words be spoken;<sup>7</sup> he who enters into an inn, and occupies a chamber, to pay for his entertainment; he who leaves a horse at a livery stable, to pay for the horse's keep. A nod at an auctioneer may be a proposal of a particular price, and the fall of the hammer may indicate the acceptance of that price.<sup>8</sup> A mere tacit recognition by a man of a woman as his wife may not only bind him to her, but bind him, on her account, to third parties.<sup>9</sup> And, as a rule, a contract evidenced by conduct may bind as effectually, there being no statutory prohibition, as a contract evidenced by words.<sup>10</sup>—On the topic before us we have the following by

<sup>1</sup> Williamson v. Williamson, L. R. 7 Eq. 542.

<sup>2</sup> Field v. Moulson, 2 Wash. C. C. 155.

<sup>3</sup> See *infra*, § 217.

<sup>4</sup> Wh. on Ev. §§ 1085, 1142, and cases there cited. That silence, when amounting to a suppression, may impose liability, see *infra*, §§ 289 *et seq.*

<sup>5</sup> Wh. on Ev. § 1151.

<sup>6</sup> Henderson v. Stevenson, L. R. 2 Sc. Ap. 470; *infra*, §§ 709 *et seq.*

<sup>7</sup> Anson on Contracts, 11; *infra*, §§ 709 *et seq.*

<sup>8</sup> *Infra*, § 25 b; Payne v. Cave, 3 T.

R. 148; Sweeting v. Turner, L. R. 7 Q. B. 310; Fisher v. Seltzer, 23 Penn. St. 308; Grotenkemper v. Achtermayer, 11 Bush, 222. See *infra*, §§ 267, 443.

<sup>9</sup> Summerville v. R. R., 62 Mo. 391; *infra*, §§ 85 *et seq.*

<sup>10</sup> Picard v. Sears, 6 A. & E. 474; Harrison v. Wright, 13 M. & W. 816; Miles v. Furber, L. R. 8 Q. B. 77; Brogden v. R. R., L. R. 2 Ap. Cas. 666; Hubbard v. Coolidge, 1 Met. 84; Thurstont v. Thornton, 1 Cush. 89; Carroll v. R. R., 111 Mass. 1; Rice v. Barrett, 116 Mass. 312; Griswold v. Haven, 25

Paulus: "Qui tacet, non utique fatetur; sed tamen verum est, eum non negare."<sup>1</sup> It should be remembered, however, that a provisional concurrence is not to be treated as final,<sup>2</sup> and that an acceptance may be conditional.<sup>3</sup> It should be remembered also that the mere reception and temporary detention of money, in payment of a purchase not accepted, does not necessarily estop the party from disputing the acceptance;<sup>4</sup> nor, as there must be an acceptance, as will presently be seen, of a proposal, to make a contract, does the mere non-refusal of an article sent, or of a proposal made, without any action implying acceptance, contractually bind.<sup>5</sup>

§ 7. When, however, work of a kind which it is usual as a business rule to pay for, is done for a person who stands by and sees the benefit flowing to himself from the work without repudiating it, then an engagement to pay a reasonable price for the work is assumed. The case is like that just noticed of a man leaving his horse at a livery stable; the entering into such a relation involves a promise to pay for the services thus to be received. It makes no matter whether the laborer comes to my place or I go to his place; if I stand by and accept his labor, this is a tacit contract of employment.<sup>6</sup>

Acceptance of services or goods may amount to an agreement to pay for them.

N. Y. 595; *Bodine v. Killeen*, 53 N. Y. 93; *Beaupland v. McKeen*, 28 Penn. St. 124; *West. Un. Tel. Co. v. R. R.*, 86 Ill. 246; *Pickrel v. Rose*, 87 Ill. 263; *St. Louis v. Shields*, 62 Mo. 247; *Thompson v. Matthews*, 56 Miss. 368; *Woodworth v. Wilson*, 11 La. An. 402. Where one party proposes a business act to be done by another, and this is done by the other party, in accordance with the request, which is notified to the proposer, this is an acceptance. *Boyd v. Brinckin*, 55 Cal. 427.

<sup>1</sup> L. 142, D. de reg. jur. (50, 17). The canon law rule, "Qui tacet, consentire videtur," is received by the jurists with several important limitations. *Lippenius*, *Senkenberg*, and *Schott* have discussed the question in treatises on *Silentium et consensus*;

and *Koch* notices as peculiarly authoritative *Brocke's Dissertatio de silentio consensum non inferente*, *Glück's essay*, *Ueber die Wirkung des Stillschweigens auf einen geschehenen Antrag*, and *Kori's essay*, *Ueber die Stillschweigenden Willenserklärung*.

<sup>2</sup> *Supra*, § 5.

<sup>3</sup> *Infra*, § 16.

<sup>4</sup> *Demuth v. Institute*, 75 N. Y. 502.

<sup>5</sup> *Infra*, § 22.

<sup>6</sup> *Infra*, § 708; *Paynter v. Williams*, 1 C. & M. 810; *Lamb v. Bunce*, 4 M. & S. 273; *Pegge v. Lampster Union*, L. R. 9 C. P. 373; *Abbot v. Hermon*, 7 Greenl. 121; *Day v. Caton*, 119 Mass. 516; *Brackett v. Norton*, 4 Conn. 524; *Smith v. Morse*, 20 La. An. 220. As to implied indebtedness, see *infra*, § 708 *et seq.*, for other cases.

But this is not the case when the party to whose benefit the work enures has no knowledge of the doing of the work at the time when it is done;<sup>1</sup> nor when the services are rendered as gratuities or courtesies;<sup>2</sup> nor when the party employed has a stated salary independently assigned to him.<sup>3</sup> But, subject to the qualifications just noticed, the acceptance of continuous services for which a commission is paid leads to the inference that future services will be paid for by commission.<sup>4</sup>—In conformity with the general rule above stated, a party who stands by, encouraging a payment to be made in his behalf, is bound to reimburse the party making the payment.<sup>5</sup> And even when such payment is not encouraged by the party on behalf of whom it is made, yet if it is made under compulsion of law, this implies a promise from such party to pay it.<sup>6</sup> But a mere volunteer payment on behalf of a party not encouraging it does not imply such a promise.<sup>7</sup>—What has been said with regard to implied contracts for a payment of services applies to implied contracts of payment for goods.<sup>8</sup> The acceptance of goods from a tradesman with whom the receiver is accustomed to deal, creates an implied promise to pay for them;<sup>9</sup> and when, after an order for goods, goods deviating from the order are sent and accepted, there is an implied contract on the part of the receiver to pay for them.<sup>10</sup> A sale, also, is implied in a

<sup>1</sup> *Infra*, § 719; Pollock, 3d ed. 10; *White v. Corlies*, 46 N. Y. 467.

<sup>2</sup> *Infra*, § 719.

<sup>3</sup> *Infra*, § 720. That when a term of service has been broken into, back wages may be recovered on a *quantum meruit*, see *infra*, § 717; and that a contract partially performed may be the basis of suit, see *infra*, § 719.

<sup>4</sup> *Thompson v. Matthews*, 56 Miss. 368.

<sup>5</sup> *Infra*, §§ 757 *et seq.*; *Forster v. Taylor*, 3 Camp. 49; *Alexander v. Vane*, 1 M. & W. 511.

<sup>6</sup> *Infra*, § 759; *Exall v. Partridge*, 8 T. R. 308; *Sapsford v. Fletcher*, 4 T. R. 511.

<sup>7</sup> *Infra*, §§ 757 *et seq.*; *England v.*

*Marsden*, L. R. 1 C. P. 529; *Richardson v. Williams*, 49 Me. 558.

<sup>8</sup> See *infra*, §§ 709, 716.

<sup>9</sup> *Infra*, §§ 709, 716; *Hart v. Mills*, 15 M. & W. 87; *Downs v. Marsh*, 29 Conn. 409; *Oatfield v. Waring*, 14 Johns. 188.

<sup>10</sup> *Oxendale v. Wetherell*, 9 B. & C. 386; *Richardson v. Dunn*, 2 Q. B. 222; *Star Glass Co. v. Morey*, 108 Mass. 570; *Wilson v. Wagar*, 26 Mich. 452; see *infra*, § 22. Whether, when there is a reception and retention of goods less in amount than the order calls for, the sender can recover is hereafter considered. (*Infra*, § 520.) Mere non-rejection of goods, however, does not imply a promise to pay; *infra*, § 22. When

recovery in trover, and in a recovery of damages, in cases where the value of the thing converted is included in the damages recovered. "But an *unsatisfied* judgment in trover does not pass the property, and is an assessment of damages, on payment of which the property vests in the defendant."<sup>1</sup>—In Pennsylvania it is held that a judgment on which execution is sued out in trespass or trover for carrying away goods, is to be regarded as divesting the plaintiff's title in the goods.<sup>2</sup>

§ 8. Contracts, as we have just seen, may be by conduct, or they may be by word of mouth, or they may be by writing, or they may be by record; and in these relations they may present innumerable variations. In one important relation, however, which will now be considered, they may be regarded as possessing a common requisite. There is no contract, so it is maintained, that may not be resolved into a proposal and an acceptance. It is possible, indeed, to conceive of the idea of a contract emanating simultaneously from two contracting minds. But the answer is that, as a matter of fact, there is no contract in which the initiative is not taken in the way of a suggestion or proposal from one party, followed up either by acceptance, or by counter-suggestion or counter-proposal from the other party; and, ultimately, no matter how protracted may be the negotiations, they are consummated, if there be a contract, in proposal and acceptance. The proposal by itself is no more a contract than a single pier on one side of a river is a bridge, or a single hook is a coupling. It is the acceptance that makes the contract, *i. e.*, the cohesion of two pur-

Contracts are resolvable into proposal and acceptance.

an order is sent for a specific amount of goods to be paid for at a certain price, at a certain day, in lump as a whole, and the vendor sends only a part of the order, and the goods sent are received and enjoyed by the purchaser, the question arises whether the vendor can recover at all, and if so, to what extent. This question is discussed in future sections; *infra*, §§ 898 *et seq.* As to whether there can

be a payment on partial failure of consideration, see *infra*, §§ 511, 520.

<sup>1</sup> Benj. on Sales, 3d Am. ed. § 49, citing *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Lovejoy v. Murray*, 3 Wall. 1, 16; *Hyde v. Nobles*, 13 N. H. 494; *Rotch v. Hawes*, 12 Pick. 138; *Osterhout v. Roberts*, 8 Cow. 43.

<sup>2</sup> *Floyd v. Browne*, 1 Rawle, 121; see *Fox v. Northern Liberties*, 3 W. & S. 107.

poses necessary to make up one joint conclusion.<sup>1</sup>—It is true that this position is assailed by Mr. Pollock, in the third edition of his valuable work on contracts, though, as he tells us, it was “tacitly adopted in the first two editions.” He maintains that the analysis does not apply to cases in which “the consent of the parties is declared in a set form, as where they both execute a deed or sign a written agreement,” wherever, in such cases, “the parties intend not to be equally bound to anything until their consent is formally declared.” “In such a case,” he holds, “it cannot be said that the proposal and acceptance constitute an agreement, at all events, not the true and final agreement.” He instances the case of a lease, and asks who in such case is the proposer and who is the acceptor? On the face of the lease itself, it is true, this question may not be capable of solution; yet this does not establish the proposition that neither party is proposer or acceptor. Parol evidence is always admissible to show the relations to each other of the parties to a contract; and though the lease itself does not indicate who was proposer and who was acceptor, yet, in the negotiations leading to the lease, there was, as to each stipulation, a proposer and an acceptor, and, were this material, the fact could be brought out by parol. No contract consists exclusively of the words in which it is ultimately expressed. It consists, not simply of those words, but also of all others which, in a proper issue, may be admitted for its explanation and rectification, and in it are to be incorporated all the relative surrounding circumstances which may serve to put it in its true light.<sup>2</sup>—An indorsement on negotiable paper, to take another illustration, consists merely of the indorser’s name; and here, we may say, there is neither proposal nor acceptance. But this indorsement is in itself a contract in short-hand; and the words of which it consists embody, in their surroundings, a proposal from the party seeking the accommodation, and an acceptance from the party granting it.<sup>3</sup> The same criticism may be applied to brokers’ memoranda. If there be a range of contracts of which instantaneousness may

<sup>1</sup> See Langd. Cont. ii. 990; Windscheid, Pandekt. § 306.

<sup>2</sup> *Infra*, §§ 627, 641, 657–9.

<sup>3</sup> Wh. on Ev. § 1061.

be predicated, it is that of brokerage as conducted in our great business centres. Myriads of contracts may be made in what to an uninitiated observer may appear to be the same instant. Yet not only may these contracts be severed, but each one of them contains in itself a proposal and an acceptance, which may be brought out by parol proof.<sup>1</sup> No matter how apparently simultaneous, on the face of a contract, may be the action of the parties, there is no case in which, if the inquiry be material, evidence may not be received showing what are virtually proposal and acceptance.—It should at the same time be kept in mind, that, unless some action is required on the part of the proposer to give efficiency to an acceptance, an acceptance is sufficiently consummated by performance of the consideration.<sup>2</sup>

§ 9. When there is no time fixed as the limit within which a proposal is to bind, it is effective only for as long a period as may be supposed to have been within the contemplation of the parties, keeping in mind the usages of the particular business.<sup>3</sup> In determining what is this reasonable time, the particular terms of the concrete case are to be considered. If a parcel of perishable goods is offered for sale, the answer must from the nature of things be prompt. It is otherwise with transactions which require long deliberation before decision. The question of reasonable time, therefore, depends (in absence of indications on the face of the agreement) in part on the usages of trade, in part on the nature of the business.<sup>4</sup> The question, also, may be conditioned by mode of communication. When this

Proposal is not to bind beyond reasonable time.

<sup>1</sup> Wh. on Ev. §§ 968 *et seq.*

<sup>2</sup> *Infra*, § 17.

<sup>3</sup> See Wh. on Ev. § 968 *et seq.*

<sup>4</sup> *Baily's case*, L. R. 5 Eq. 428; 3 Ch. 592; *Dunlop v. Higgins*, 1 H. L. C. 381; *Ramsgate Hotel v. Montefiore*, L. R. 1 Ex. 109; *Eliason v. Henshaw*, 4 Wheat. 225; *Beckwith v. Cheever*, 1 Fost. (21 N. H.) 41; *Abbott v. Shepard*, 48 N. H. 14; *Loring v. Boston*, 7 Met. (Mass.) 409; *Barnes v. Perrine*, 9 Barb. 202; *Chicago, etc. R. R. v.*

*Dane*, 43 N. Y. 240 (where a delay of four months was held to avoid); *Johnston v. Fessler*, 7 Watts, 48; *Mactier v. Frith*, 6 Wend. 103; *Potts v. Whitehead*, 5 C. E. Green, 55; 8 C. E. Green, 512; *MacLay v. Harvey*, 90 Ill. 525; *Judd v. Day*, 50 Iowa, 247; *Stockham v. Stockham*, 32 Md. 196; *Martin v. Black*, 21 Ala. 721; and cases cited in *Wald's Pollock*, 9; *Pollock*, 3d ed. 24-25.

is by parties speaking face to face, an immediate reply, as has been said, is to be expected;<sup>1</sup> while, when the telephone, the telegraph, and the post are resorted to, the delays incident to each of these modes of transmission are to be taken into account. Where, however, the course of business is to return an immediate answer, if an immediate answer is not returned the proposal will be regarded as declined. And it was held in Illinois, in 1880, that where an offer is made by post, it being understood between the parties that there should be an answer by return post, the making of the offer implies the stipulation that the answer should be sent by return of post.<sup>2</sup> But "an offer which is in its nature continuous and open for some period of time, and which is also conditional upon an event which may not immediately happen, but must at all events be attended with some delay, becomes a valid contract on good consideration, if accepted in fact, and upon the fulfilment of the condition, within a reasonable time and before an actual retraction of the offer."<sup>3</sup>

When proposal is rejected, its force is exhausted.

§ 9a. When a proposal is rejected, its force is exhausted, if the rejection reaches the proposer before acceptance.<sup>4</sup> But a mere letter of inquiry cannot be treated as a rejection.<sup>5</sup>

<sup>1</sup> Johnson v. Fessler, 7 Watts, 48.

<sup>2</sup> Maclay v. Harvey, 90 Ill. 525. As sustaining the text, see Boyd v. Brinckin, 55 Cal. 427. That a guarantee must be promptly accepted in order to bind, see Brandt, Suretyship, § 158; *infra*, § 570. That there should be a reasonable time allowed for performance, see *infra*, § 882. As to the meaning of "forthwith" and similar terms, see *infra*, § 886. That time may be of essence, see *infra*, § 887.

<sup>3</sup> Bernstein v. Lans, 104 Mass. 216, citing Train v. Gold, 5 Pick. 380; Goward v. Waters, 98 Mass. 596. That a proposal, if not continuous, must be accepted immediately, see *infra*, § 14. In Stevenson v. McLean, L. R. 5 Q. B. D. 346, the defendant wrote to the

plaintiff that he would sell certain iron warrants for 40s., net cash, open all Monday. On Monday morning the defendant received a telegram from the plaintiff: "Please wire whether you would accept forty for delivery over two months, or, if not, longest limit you would give." It was held that this was not a rejection of the defendant's offer, which was still open during the Monday, and which, when accepted, formed a contract binding the defendant.

<sup>4</sup> Leake, 2d ed. 47; Hyde v. Wrench, 3 Beav. 334; Honeyman v. Marryatt, 21 Beav. 14; Wager v. Chew, 15 Penn. St. 323.

<sup>5</sup> Stevenson v. McLean, L. R. 5 Q. B. D. 346.



§ 10. Supposing a proposal to be made orally, the negotiators conversing face to face, or by telephone, there can be no question that if the person addressed hesitates, the person proposing can withdraw the proposal before the person addressed signifies his acceptance. A similar right of withdrawal exists when the proposal is made by mail or by telegraph.<sup>1</sup> "If there be no contract until acceptance, there is nothing by which the proposer *can* be bound."<sup>2</sup> Before acceptance a proposal is "but an offer to contract, and the parties making the offer might undoubtedly withdraw it at any time before acceptance."<sup>3</sup>—The right to revoke before acceptance is one which prior conditions cannot limit.—Thus, at an auction sale, the bidder may recall his bid at any time before the hammer falls, though the conditions of sale are that no bidding shall be retracted,<sup>4</sup> and the seller may retract though the sale was to be without reserve.<sup>5</sup> It would be a *petitio principii* to say that the party retracting was bound by contract not to retract, since it is to this very contract not to retract that his retracting applies.<sup>6</sup> But as we will soon see more fully, when an acceptance has been duly posted or telegraphed, a revocation is ordinarily too late.<sup>7</sup>—Whether there is a revocation, is, in all cases of conflicting inferences, a question of fact. Thus in a New York case in 1880, in a contract for the sale of 5000 feet of lumber was the following clause: "and I agree to pay said Q. four and a half cents per foot for from six to fourteen thousand feet of the same kind and quality of the timber as aforesaid, and delivered at place aforesaid during the winter, to be paid on

Until accepted a proposal may be revoked, but not afterwards.

<sup>1</sup> Vangerow, § 603; Windscheid, § 305; Pollock, 3d ed. 22; Routledge v. Shotwell, 13 Bush, 271; and cases hereafter cited.

Grant, 4 Bing. 653; Honeyman v. Marryatt, 21 Beav. 14; 6 H. L. C. 112; Harris's case, L. R. 7 Ch. 587; Stitt v. Bartlett, 3 Cush. 224.

Huidekopers, 17 Wall. 384; Beckwith v. Cheever, 21 N. H. 41; Faulkner v. Hebard, 26 Vt. 452; Boston & Me. R. R. Co. v. Bartlett, 3 Cush. 224; Crocker v. R. R., 24 Conn. 249; Moline Co. v. Beed, 52 Iowa, 307; Burton v. Sugden, V. & P. 11; Dart, V. & P. 3d ed. 80; Leake, 2d ed. 42; as to auctions, see *infra*, §§ 25 b, 267, 443.

<sup>5</sup> Warlow v. Harrison, 1 E. & E. 295; Harris v. Nickerson, L. R. 8 Q. B. 286.

<sup>6</sup> Benj. on Sales, 3d Am. ed. § 41.

<sup>7</sup> *Infra*, §§ 11, 18, 27.

the first day of June, 1874." There was no acceptance by Q. of the proposal to deliver the additional lumber. It was held that the clause quoted was a mere proposal, not binding until acceptance, and that it could therefore be revoked at any time before acceptance; but that the proof of revocation before acceptance must be made out by the party setting up the revocation, and that the question whether there was a revocation, supposing there was no order revoking produced, and there was conflicting testimony, was one of fact to be decided on all the circumstances of the case.<sup>1</sup>—It is also to be kept in mind that, as the performance of the consideration involves an acceptance, and as it is not necessary that the performance of the consideration should at the time be communicated to the proposer unless required by the terms of the contract, a proposal cannot be revoked after the consideration has been performed.<sup>2</sup> But the consideration must be entirely performed before the promisee can sue. It is not enough for it to be begun. The condition must be performed entire.<sup>3</sup>

§ 11. When a proposal, therefore, is fully acted on by the party addressed, this establishes between the parties a contractual relation which cannot be broken unless by the provisions of the transaction itself, or by a revocation communicated to the party addressed. The proposal, in fact, is virtually this: "I offer to do this particular thing, but my offer continues open only either (1) to a fixed date, or (2) for what under the circumstances is a reasonable period. And if the latter be the alternative, then, within this reasonable period, I reserve the right to revoke the proposal at any time before acceptance." Hence, a revocation to be operative must be brought home to the party holding a proposal which is still in force; and an acceptance prior to the reception of such revocation,

<sup>1</sup> Quick v. Wheeler, 78 N. Y. 300. In a Michigan case, in 1880, P. sent the following order to V.: "You will please send me galvanized lightning rods for my house within sixty days, for which I will give you thirty-five cents per foot, due when work is com-

pleted." It was held that this was an order which P. could withdraw at any time before acceptance or performance. Weiden v. Woodruff, 38 Mich. 130.

<sup>2</sup> *Infra*, §§ 17, 24.

<sup>3</sup> *Infra*, § 545.

though after it was forwarded, binds the proposer.<sup>1</sup>—In an English case, decided in 1880,<sup>2</sup> the defendants, at Cardiff, Wales, wrote on October 1st, 1879, to the plaintiffs at New York, offering 1000 boxes of tin plates on terms specified in their letter; and on receipt of the letter, on October 11th, an acceptance was telegraphed by ocean cable, which was followed by a letter of acceptance posted on October 15th. On October 8th, however, the defendants, in a letter received by the plaintiffs on October 20th, explicitly withdrew their offer. (It was held by Lindley, J., that a withdrawal of an offer is not effective until communicated to the party to whom it is sent, and that posting a letter of withdrawal is no such communication.) The same position was shortly afterwards taken by Lush, J.<sup>3</sup> And it is argued by Mr. Pollock<sup>4</sup> that “it seems impossible to find any reason in principle why the necessity for communication should be less in the case of a revocation which is made not by words but by conduct, as by disposing to some one else of a thing offered for sale.”<sup>5</sup> And it is settled in England that it is not necessary that the revocation should be made in any formal terms. A sale, for instance, to B. of an article previously offered to A., is a revocation of the proposal to A. (if A. be notified of the sale).<sup>6</sup>

§ 12. The rule that a revocation of a proposal, to be effective against the party addressed, must be brought home to him, does not apply when the proposer dies before the proposal is accepted. In

Except in case of proposer's death or insanity.

<sup>1</sup> *Supra*, § 10; Leake, 2d ed. 42; Benj. on Sales, 2d Eng. ed. 52, 3d Am. ed. § 41 *et seq.*; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346; *Craig v. Harper*, 3 Cush. 158; *Boston, etc. R. R. v. Bartlett*, 3 Cush. 224; *Wheat v. Cross*, 31 Md. 99; *Judd v. Day*, 50 Iowa, 247.

<sup>2</sup> *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344. See further, *infra*, § 18.

<sup>3</sup> *Stevenson v. McLean*, L. R. 5 Q. B. D. 346.

<sup>4</sup> *Op. cit.* 3d ed. 26.

<sup>5</sup> In *Dickinson v. Dodds*, L. R. 2 Ch. D. 463, C. A. (reversing *Bacon v. C.*), it was held, that, if the party addressed

knows that before the acceptance the proposer had done something absolutely inconsistent with the proposal (*e. g.*, sold the property to a third party), this is a revocation. Mr. Pollock adds that “*Cooke v. Oxley*, 3 T. R. 653, may be so read as to support the opinion that a tacit revocation need not be communicated at all. But the apparent inference to this effect is expressly rejected in *Stevenson v. McLean*, 3 Q. B. D. 351.”

<sup>6</sup> *Dickinson v. Dodds*, L. R. 2 Ch. D. 463.

this case the contract fails from impossibility of completion.<sup>1</sup> But in case of the proposer's death after acceptance, the proposer's estate is bound.<sup>2</sup> A proposal, also, lapses on the death of the party addressed before acceptance.<sup>3</sup>—It has been suggested, also, that insanity of the proposer may be regarded as operating as a revocation;<sup>4</sup> but this can only obtain in cases where the insanity is such as to extinguish capacity.<sup>5</sup> When it has this effect, it operates to revoke a proposal.<sup>6</sup>

§ 13. Can a proposer bind himself to keep open a proposal

Proposer  
may bind  
himself to  
keep open a  
proposal to  
a specified  
date.

until a specific date, so that an acceptance any time within that date would be good? That he can is affirmed by leading authorities in the Roman law;<sup>7</sup> and there is strong reason on principle to hold, that, (if such a proposal is communicated to a specific party, with the knowledge of the proposer, and the party addressed has the matter under consideration, the proposer cannot, being advised of this fact, withdraw the offer within the period limited.) The person addressed may have several other opportunities of the same kind open to him—there may, for instance, be several houses offered to him for rent; and an inquirer of this class has usually such an option. One is offered to him at a designated rent, a fixed period being given to him in which he is to make up his mind. Trusting to this, he declines others. The very fact of his entertaining the offer, involving a suspension, no matter how slight, of his inquiries in other quarters, is a sufficient consideration to bind

<sup>1</sup> Pollock, *ut supra*, citing *Dickinson v. Dodds*, L. R. 2 Ch. D. 475; *Anson*, 24; *Blades v. Free*, 9 B. & C. 117; *Campanari v. Woodburn*, 15 C. B. 400; *Lee v. Griffin*, 1 B. & S. 272; *Frith v. Lawrence*, 1 Paige, 434; *Pratt v. Trustees*, 93 Ill. 475. That a subscription to a charity is revoked by subscriber's death, see *infra*, § 528. In *Dickinson v. Dodds*, *ut supra*, *Mellish*, L. J., said: "It is admitted law, that, if a man who makes an offer dies, the offer cannot be accepted after he is dead; and see *Meynell v. Surtees*, 25 L.

J. C. 260. The conflict in the analogous cases of death of principal, after agency is instituted, is discussed in *Wh. on Ag.* § 101.

<sup>2</sup> *Mactier v. Frith*, 6 Wend. 103.

<sup>3</sup> *Warner v. Humphries*, 2 M. & G. 853.

<sup>4</sup> Pollock, 3d. ed. 37, citing *Bramwell*, L. J., in *Drew v. Nunn*, L. R. 4 Q. B. D. 669.

<sup>5</sup> *Infra*, § 117 a.

<sup>6</sup> *Beach v. Church*, 96 Ill. 177.

<sup>7</sup> *Toullier*, *Droit Civ.* No. 30; *Vangerow*, § 603; *Windscheid*, § 305.

the party making to him the proposal.<sup>1</sup> To the same effect is an illustration given by Mr. Bell.<sup>2</sup> "If, for example, a merchant propose to sell to another a cargo of sugar or of tobacco, and agree to give him a certain time to determine whether he will buy the goods or not, engaging not to dispose of them till the time has elapsed, and in the mean while he dispose of them, and disappoint the person to whom the promise has been made, who may have rejected an advantageous offer from another dealer, (it seems unjust that, for the disappointment thus occasioned, there should be no remedy.)"<sup>3</sup> But wherever there is a wrong there is a remedy; and we are entitled to hold, on principle, that when a proposal, to be good for a specific period, is thus acted on, to the proposer's knowledge, by the party to whom it is addressed, it cannot be revoked within that period. To this conclusion several adjudications in this country tend.<sup>4</sup> On the other hand, Mr. Benjamin<sup>5</sup> says: "Even when on making the offer the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may nevertheless be retracted in the interval, if no consideration has been given for the promise."<sup>6</sup> By Mr. Pollock, also, we are told

<sup>1</sup> *Infra*, §§ 493 *et seq.*

<sup>2</sup> Bell on Sales, quoted Story on Cont. § 496.

<sup>3</sup> Mr. Bell proceeds to say: "The only answer to this in the English law appears to be, that no one is entitled to rely on a unilateral engagement gratuitously made and without consideration. But one cannot help feeling that a rule so different from what commonly happens in the intercourse of life raises that inconsistency between law and justice which is sometimes complained of." As will be seen, however, the English rule is not settled to the extent supposed by Mr. Bell. And the engagement is not without consideration when the party receiving the promise suspends, no matter to how slight a degree, his inquiries elsewhere. *Infra*, § 505.

<sup>4</sup> *Violett v. Patton*, 5 Cranch, 142;

*Appleton v. Chase*, 19 Me. 74; *Train v. Gold*, 5 Pick. 384; *Boston & Me. R. R. Co. v. Bartlett*, 3 Cush. 225; *Brooks v. Ball*, 18 Johns. 337; *Willetts v. Ins. Co.*, 45 N. Y. 45. To the same effect is *Story on Cont. § 496*; *Metcalf on Cont.* 19-21; 2 Kent Com. 477 *n. d.*; Wald's notes to Pollock, 8-9; 1 Duer on Ins. 118.

<sup>5</sup> Sales, 3d Am. ed. § 41.

<sup>6</sup> To this point the American editor cites *Craig v. Harper*, 3 Cush. 158; *Boston, etc. R. R. v. Bartlett*, 3 Cush. 224; *Hochster v. Baruch*, 5 Daly, 440; *Burton v. Shotwell*, 13 Bush. 271; *Falls v. Gaither*, 9 Port. 605; *Eskridge v. Glover*, 5 St. & P. 264. In *Eskridge v. Glover*, 5 St. & P. 264, there was a proposal by A. to B. to exchange horses with a specific sum to be given to B. to make the matter even, with the privilege to B. to decide upon the proposal

that "even if he (the proposer) purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct collateral contract to that effect, founded on a distinct consideration."<sup>1</sup> But the authorities cited by Mr. Pollock do not justify this broad assertion; and it is, in fact, much modified in a note on the same page of the second edition of his work, where he tells us "that an action would lie for a breach of promise to keep the offer," which would not be the case if the party were not in some sense bound by his promise.<sup>2</sup> So far as concerns Mr. Benjamin's summary, it

by a certain day. It was held that under this agreement A. had the right to recede before the day designated. And see *Beckwith v. Cheever*, 21 N. H. 41; *Faulkner v. Hebard*, 26 Vt. 452.

<sup>1</sup> Pollock, 3d ed. 23, citing *Cooke v. Oxley*, 3 T. R. 653; *Great North. R. R. v. Witham*, L. R. 9 C. P. 16; *Hochster v. De la Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Routledge v. Grant*, 4 Bing. 653; *Dickinson v. Dodds*, L. R. 2 Ch. D. 463; *Eskridge v. Glover*, 5 St. & P. 264.

<sup>2</sup> *Cooke v. Oxley*, 3 T. R. 653, which is supposed to rule that an offer which is to remain open till a specified date does not bind the proposer, does not, as will be seen, sustain that position. In this case, as reported, the evidence was that Oxley proposed to sell Cooke certain tobacco at a certain price, Cooke having till four o'clock on the same afternoon "to agree to or dissent from the proposal." Before the hour designated, Cooke notified Oxley that he agreed to take the tobacco. Oxley, however, refused to deliver it, and a suit was brought against him for damages. A verdict was taken for the plaintiff, but judgment was arrested. (See Benjamin on Sales, 3d Am. ed. §§ 64-67; Leake on Contracts, 2d ed. 44, cited by Wald, note to Pollock, 9.) Lord Kenyon

said: "Nothing can be clearer than that, at the time of entering into this contract, the engagement was all on one side; the other party was not bound; it was therefore *nudum pactum*." To this Buller, J., added: "It is not stated that the defendant did agree, at four o'clock, to the terms of the sale." From these expressions we must infer that, in the opinion of the court, the cause of action set forth in the declaration amounted simply to a promise, not accepted or acted on by the promisee, to make a sale at a future date. There was no averment in the declaration either that the promise was a continuing one, or that it had been accepted by Cooke; and hence, being a mere vague tentative proposal, not accepted by Cooke, Cooke could not play with it fast and loose. He was bound, if he received the proposal subject to this option, to say so; he could not repel or ignore the proposal, and then afterwards treat it as continuing. If he wished to have bound Oxley, he should have said: "I accept your proposal to sell the tobacco to me in case I call for it before four o'clock." Because the declaration did not aver any such relation between the parties, judgment was arrested. That this is the purport of the decision in this famous case is shown by the comments

does not differ in principle from the rule here advocated. It is not disputed that a parol contract without consideration is

of Bayley, J., in *Humphries v. Carvalho*, 16 East, 47: "The question in *Cooke v. Oxley*," so said this learned judge, who may be regarded almost as a contemporaneous expositor, "arose upon the record, and a writ of error was afterwards brought on the judgment of this court, by which it appears that the objection made was that there was only a proposal of sale by the one party, and no allegation that the other party had acceded to the contract of sale." In other words, as is stated by Judge Metcalf (who rejects, as "unreasonable and inconsistent with good faith, and at variance with acknowledged principles of law," the rule that an offer to sell within a specific limit does not bind the proposer), "in setting forth an offer on a given day, and averring an acceptance afterwards, though on the same day, a party does not show necessarily that there was any mutual assent. The offer, as has before been stated, may have been retracted, or rejected, or have expired, within an hour from the time it was made. And as this depends on such a variety of circumstances, peculiar to each case, it would be a great stretch of credulity, as well as of legal presumption, to assume that an acceptance of an offer, on the same day it was made, does, of course, evince a mutual concurrent assent of the parties, according to the principles above suggested." Judge Metcalf further argues that *Cooke v. Oxley* is inconsistent with *Adams v. Lindsell*, 1 B. & Ald. 683, which held that an offer in a letter is to be regarded as continuing during all the time it is in the mail. Such (unless revoked by telegram or other more rapid mode of communication) is undoubtedly the

intention of the party making the offer. But if, as in *Cooke v. Oxley*, I say to a customer, face to face, "I will hold this matter open for you till four o'clock," and if, as may have been the case so far as the declaration in *Cooke v. Oxley* averred, instead of agreeing to this, he turns his back on me and walks off, a continuing offer on my part cannot be inferred. There must, in such case, be a continuing offer on which the party addressed relied; and this, if he seeks to recover on the proposal, he must aver and prove. To this effect, see *Routledge v. Grant*, 4 Bing. 653; *Dickinson v. Dodds*, L. R. 2 Ch. D. 463; *Larmon v. Jordon*, 56 Ill. 204.

In *Dickinson v. Dodds*, L. R. 2 Ch. D. 463, the defendant's memorandum, on which suit was brought, was as follows: "I hereby undertake to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and out-buildings, etc., for the sum of £800, etc. (Signed) John Dodds. P. S. This offer to be left over until Friday, 9 o'clock A. M. (the twelfth) 12th June, 1874. (Signed) J. Dodds." The plaintiffs notified their acceptance before the expiration of the time specified, but were informed that the defendant had sold the property on June 11th to a third party. A bill for specific performance was decided in the plaintiffs' favor by Bacon, V. C. This was reversed by the court of appeal. James, L. J., said: "It is clear settled law, on one of the clearest principles of law, that this promise being a *nudum pactum* was not binding, and that, at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said

a nullity, and that a promise to hold open a proposal, if without any consideration, cannot, therefore, be enforced. What is here maintained is that a proposal to hold open an offer is, if accepted, a bargain from which ordinarily a consideration is to be inferred. It is true that if the party addressed should say, "You may do as you please; I will abandon no right, even in the slightest degree, in consequence of what you tell me; I will pursue my inquiries just as if I never heard from you; I shall not take the least amount of trouble in looking into your offer; I will behave as if I never heard it;" then we might say, "This is all speaking to the winds; the party addressed has done nothing and omitted nothing in consequence of what has been said to him; the proposal does not bind." This would undoubtedly be the case with a proposal to a party who takes no action whatever on the proposal.

that the only mode in which Dodds could assert that freedom would be by actually and distinctly saying to Dickinson, Now I withdraw my offer. I apprehend there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing." The objection to the above reasoning is the assertion with which it starts that the agreement was a *nudum pactum*. So far as the particular case went, this may have been so. But ordinarily the proposal means: "I will agree to keep the matter open for a day (or week, as the case may be), if you will consider the matter and not commit yourself at once to some other pending proposal." This is a sufficient consideration.

As approving *Cooke v. Oxley*, see *Tucker v. Woods*, 12 Johns. 190;

*Chic. etc. R. R. v. Dane*, 43 N. Y. 240; *Gillespie v. Edmonston*, 11 Humph. 553.

In *Benj. on Sales*, 3d Am. ed. §§ 64 *et seq.*, *Cooke v. Oxley* is elaborately vindicated; and to the position in the text that the detriment to the vendee by keeping the matter open is a consideration, it is replied that this takes such detriment, or "inconvenience," for granted. But this is the case with all propositions for conditional sales. (*Infra*, § 547.) Here the offer is substantially this: "I will keep this thing for you until to-morrow in consideration of your putting aside other competing openings." If the promisee, having this offer in view, rejects other offers which he might otherwise accept, this detriment is a good consideration. In *Hallock v. Ins. Co.*, 2 Dutch. 268, *Cooke v. Oxley* is spoken of as having been effectually overruled in England; and in *Boston, etc. R. R. v. Bartlett*, 3 Cush. 228, *Fletcher, J.*, says that *Cooke v. Oxley* "has certainly, in later cases, been entirely disregarded, and cannot now be considered as of any authority."



But if any action whatever be taken on the proposal, whether this action consists in trouble, no matter how trivial, taken in consequence of the proposal by the party addressed, or in a suspension by him, no matter how brief, of inquiries elsewhere, the proposer being cognizant thereof, this makes a binding contract. Even the mere holding the matter under advisement is a consideration that binds. The party proposing says: "If you will consider this proposal, I will give you a day to decide." This the party addressed accepts. The fact that it is thus to be acted on is a concession that forms an adequate consideration.<sup>1</sup> Sometimes it may be a matter of much importance to the proposer to be able to say: "I have offered the matter to Mr. A., who has it under consideration." But, be the benefit thus arising to the proposer great or little, the party entertaining the proposition, if it be seriously entertained (of this as of all other contracts seriousness being a condition), gives it the time and examination necessary for due deliberation. And this is a sufficient consideration.

§ 14. We have seen<sup>2</sup> that a continuous proposal only binds for a reasonable time. Whether a proposal is continuous depends not only upon the language used, but upon the mode of the negotiation. If it should be said, "these goods are yours if called for during business hours to-day," and the party addressed accepts, either expressly or tacitly, in conformity with the usages of business, the proposal, this is a sale defeasible on part of the vendor in case the purchaser does not comply with the condition of calling for the goods. An action for the price, based on the contract, would lie against the vendee if he took the goods; an action for the damages incurred would lie on the contract against the vendor in case he did not deliver the goods when called for within the time limited. Yet, on the other hand, the proposal may be simply this: "If you call at any time within ten days, I will procure a certain article for you at a certain price." In such case there is no sale, though (if the transaction be not void as a gambling adventure) the proposer would be liable, in case his promise was not made good, for

Proposal  
not binding  
if not con-  
tinuous.

<sup>1</sup> See *infra*, §§ 505, 515, 516.

<sup>2</sup> *Supra*, § 9.

any damages accruing to the other party from its breach. Or the proposal may be to sell if called for at a particular time, and the proposal may be made face to face, but may not be assented to when assent would be practicable and in accordance with business usage. In such case the proposal is not binding if not continuing, though if continuing it binds.<sup>1</sup>—Mr. Leake<sup>2</sup> gives the following examples of rulings on offers limited in continuance: A tender to supply goods at certain prices during twelve months may be accepted from time to time during the twelve months, provided the tender is not otherwise withdrawn, by ordering goods upon the terms of the tender.<sup>3</sup> An agreement to carry all goods presented for carriage at a certain rate during twelve months is to be construed as a mere offer that may be accepted from time to time by delivering goods for carriage;<sup>4</sup> and an analogous interpretation has been applied to an offer to guarantee the payment of a particular line of bills for twelve months.<sup>5</sup> In such case the guarantee may be revoked at any period during the continuance, except so far as it has been acted on.<sup>6</sup>—The modification, before acceptance, of the law under which a continuing proposal is made, if material, may operate as a revocation.<sup>7</sup>

If not accepted within designated limit as to time or place, proposal falls.

§ 15. Whatever we may think as to the questions abovementioned, it is plain that, when the party addressed has a specific time within which to accept a proposal, the proposal falls if not accepted within the limit.<sup>8</sup> The proposal, also, may fix a limit as to the

<sup>1</sup> See authorities cited to §§ 9, 13; *Mactier v. Frith*, 6 Wend. 103; *Langdell*, Ca. Cont. 1091. As to continuing considerations, see *infra*, § 515. That a party delivering goods to a proposed purchaser on trial, is bound by his proposal to sell, see *Hunt v. Wyman*, 100 Mass. 198.

<sup>2</sup> 2d ed. 41.

<sup>3</sup> *Great North. R. R. v. Witham*, L. R. 9 C. P. 16.

<sup>4</sup> *Burton v. R. R.*, 9 Ex. 507.

<sup>5</sup> *Offord v. Davies*, 12 C. B. N. S. 748.

<sup>6</sup> *Ibid.* As to continuous guarantees, see *infra*, § 570.

<sup>7</sup> *Mercer Co. v. R. R.*, 27 Penn. St. 389.

<sup>8</sup> *Infra*, §§ 881 *et seq.*; *Vangerow*, *ut supra*; *Jackson v. Galloway*, 5 Bing. N. C. 75; *Mactier v. Frith*, 6 Wend. 103; *White v. Corlies*, 46 N. Y. 467; *Potts v. Whitehead*, 5 C. E. Green, 55; *Longworth v. Mitchell*, 26 Ohio St. 334; *Maclay v. Harvey*, 90 Ill. 525; *Smith v. Wetherell*, 4 Ill. App. 655; *Eskridge v. Glover*, 5 St. & P. 264. That when required an answer must be sent by return mail, see *infra*, § 19.

place of acceptance. If so, unless the condition is complied with, no contract is perfected.<sup>1</sup> "The proposal," says Mr. Pollock,<sup>2</sup> "may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted. If no time is prescribed, the acceptance must be communicated to him within a reasonable time."<sup>3</sup> Even a partial payment, by the promisee, if made conditionally, does not bind him to a proposal which he does not accept. Thus, in an Illinois case in 1880, the evidence was, that V. made the following memorandum in his books: "Sold this day to P. a bill of lumber to complete a house for himself at the following prices." This was followed by a specification of prices but not of quantity. It was held that this was a mere proposal which was not a contract until accepted, and that P. making a payment on account was not of itself an acceptance.<sup>4</sup>

§ 16. An acceptance, as well as a proposal, may be conditional; that is to say, it may be conditioned upon something at present uncertain.<sup>5</sup> Thus a proposal to take goods on trial may be accepted dependent on the contingency contemplated in the offer, and the contract, supposing there be no unfair advantage taken by the purchaser, does not bind unless the goods prove satisfactory.<sup>6</sup> When the proposal is thus made, the purchaser is entitled to hold the goods during the period limited for trial.<sup>7</sup> And where the proposal is to take with a right to return if not liked, this makes a sale with a right of contingent rescission.<sup>8</sup> On the other hand, the acceptance, though partial, must be unqualified to be operative, that is to say, the accept-

Proposal and acceptance may be conditional.

<sup>1</sup> *Infra*, § 881; Savigny, viii. § 371; 2 Phila. 289; Bowney v. Clark, 22 Puchta, Pandekt. § 251; Adams v. Pitts. L. J. 69.

Lindsell, 1 B. & Ald. 681; Stocken v. <sup>5</sup> *Infra*, §§ 545 *et seq.*

Collen, 7 M. & W. 515; Eliason v. Hen- <sup>6</sup> Hunt v. Wyman, 100 Mass. 198; shaw, 4 Wheat. 225, and cases cited; *infra*, § 589.

Wh. Con. of L. § 421.

<sup>2</sup> 3d ed. 24.

<sup>3</sup> *Supra*, § 9; *infra*, § 19.

<sup>4</sup> Smith v. Weaver, 90 Ill. 392. That <sup>7</sup> Ellis v. Mortimer, 1 B. & P. 257; see *infra*, §§ 589 *et seq.*; Reed v. Upton, 10 Pick. 522. That a provisional concurrence is not final, see *supra*, § 5.

by business usage the proposal may be <sup>8</sup> Witherby v. Sleeper, 101 Mass. 138. conditioned on acceptance by next convenient mail, see Carmichael v. Newell,

ance must go to some one specified thing put forth by the proposal.<sup>1</sup> A promise, also, to pay on performance of an act from which the promisee will incur a loss, becomes binding on the performance of the act.<sup>2</sup> Nor is the promise less binding from the fact that the consideration is contingent, being dependent on the option of the promisee.<sup>3</sup> But if the promise be on a condition not afterwards complied with, there is no contract.<sup>4</sup> And, where an application was made to an institute for an allotment of space in its hall for exhibition, the applicant paying the stipulated entrance fee, and the institute reserving the right of rejection, it was held that this did not constitute a contract to award the desired space.<sup>5</sup>—Agreements contingent upon the action of other parties are hereafter distinctively considered.<sup>6</sup>

§ 16 *a*. What has just been said applies to subscriptions to joint enterprises.<sup>7</sup> Whether such subscriptions bind, as having sufficient consideration, will be hereafter considered.<sup>8</sup> At present we have to notice that until they are accepted they are merely inchoate, and have no binding force.<sup>9</sup>

§ 17. Where the proposal is conditioned on notice of acceptance being communicated, or when anything is to be done by the proposer in order to make an acceptance operative, the fact of the acceptance must be communicated to the proposer.<sup>10</sup> Thus, where a party applies for shares in a company, and these shares are allotted to him, he is not bound until notice is communicated to him of the allotment, his proposal being conditioned on communi-

<sup>1</sup> Pollock, 3d ed. 37.

<sup>2</sup> *Hilton v. Southwick*, 17 Me. 305; *Morse v. Bellows*, 7 N. H. 563; *Sturgis v. Robbins*, 7 Mass. 301; *Worrell v. Pres. Ch.*, 8 C. E. Green, 96; see 1 Ch. on Con. 10th Am. ed. 29; *infra*, § 505.

<sup>3</sup> *Great N. R. R. v. Witham*, L. R. 9 C. P. 16; *Barnes v. Perrine*, 9 Barb. 205; *Willets v. Ins. Co.*, 45 N. Y. 45, and cases cited, *infra*, §§ 524, 589. As to conditional acceptance, see further *Gray v. James*, 128 Mass. 110.

<sup>4</sup> *Infra*, §§ 545 *et seq.*

<sup>5</sup> *Demuth v. Institute*, 75 N. Y. 502.

<sup>6</sup> *Infra*, § 528.

<sup>7</sup> See *infra*, §§ 528, 595.

<sup>8</sup> *Infra*, § 528.

<sup>9</sup> *Ives v. Sterling*, 6 Met. 310; *Ayer's App.*, 28 Penn. St. 179; *Commis. v. Perry*, 5 Ohio, 58; *Stuart v. R. R.*, 32 Grat. 146.

<sup>10</sup> *Leake*, 2d ed. 34. See *Lang. Cas. on Cont.* 993.

cation of acceptance.<sup>1</sup> Registration, in such case, of the applicant is not enough; nor is it enough to send notice of the allotment to a local agent of the company through whom the application had been received.<sup>2</sup> An acceptance of an offer of guarantee, also, must be communicated to the guarantor, in order to bind him.<sup>3</sup> But a party, by acting on the fact of acceptance, may waive formal proof of notice of acceptance having been communicated to him.<sup>4</sup> Nor need the notice be express. It may be implied from the conduct of the parties.<sup>5</sup>—An agent specially appointed by the receiver to deliver his acceptance to the proposer, is regarded as the mere extension of his employer; and as long as the acceptance remains in the agent's hands, it is supposed to remain in the principal's hands. Hence there is no contract in such a case until the acceptance is delivered to the proposer.<sup>6</sup> On the other hand, notice of acceptance is not necessary in cases where the proposal is conditioned on certain things to be done by the acceptor, and the doing of these things is made known to the proposer. In other words, where certain things are to be done by the promisee on condition of promisor's promise being performed, the promisor becomes liable on his promise on the promisee's performance of the condition.<sup>7</sup> But wherever the proposal requires a counter-offer on the part of the promisee, and not the mere performance of a condition, then the counter-offer must be communicated to the proposer. It follows that, when a promise is a consideration for a promise, then the parties must reciprocally accept each other's promises, and in order to accept, the promises must be reciprocally communicated.<sup>8</sup>

<sup>1</sup> Ibid.; Pellatt's case, L. R. 2 Ch. 527; Gunn's case, L. R. 3 Ch. 40; Sahlgreen's case, L. R. 3 Ch. 323; Robinson's case, L. R. 4 Ch. 322; Ward's case, L. R. 10 Eq. 659.

<sup>2</sup> Ibid.; Hobb's case, L. R. 4 Eq. 9.

<sup>3</sup> Leake, *ut supra*; Mosley v. Tinkler, 1 C. M. & R. 692; McIver v. Richardson, 1 M. & S. 557; *infra*, § 570.

<sup>4</sup> Richards v. Assurance Asso., L. R.

6 C. P. 591; Levita's case, L. R. 3 Ch. 36; Crawley's case, L. R. 4 Ch. 322. As to notice see fully *infra*, §§ 567 *et seq.*; as to waiver, *infra*, § 604.

<sup>5</sup> Richards v. Assurance Asso., L. R. 6 C. P. 591; *infra*, §§ 602 *et seq.*

<sup>6</sup> Thayer v. Ins. Co., 10 Pick. 326. See Bryant v. Booze, 55 Ga. 438.

<sup>7</sup> See *infra*, §§ 24, 545 *et seq.*

<sup>8</sup> See *infra*, § 523; Lang. Sum. § 13.

§ 18. That a proposal made by me to another, in writing or through a messenger, does not bind me until I know it is accepted, may be conceded in all cases in which the proposal, either from its express terms or from the course of business to which its interpretation is subject, is dependent for its binding force on notification to me of its acceptance. We may also hold that generally a posting of a letter is not delivery to the sendee.<sup>1</sup> On the other hand it is competent for me to bind myself by a proposal conditioned upon the acceptance being forwarded to me by mail.—It is no objection to this position that by it one party is conditionally bound and the other not. This objection if good would vitiate all conditional sales and sales on trial; yet conditional sales and sales on trial, as we will see elsewhere, have in many instances been held good.<sup>2</sup> The proposal is simply this: “If you will post an acceptance to this offer within a fixed time, or a reasonable time, as the case may be, I will forward you the goods, or perform for you the service.” On posting the answer by the party addressed, the proposer becomes bound on his proposal, though the answer never reached him. Even supposing the loss occur through the negligence of the post-office, and not his own negligence, yet, on such a proposal, the loss falls on him who designated this channel of communication, or did business in subjection to a usage by which it is designated, more properly than upon the party forwarding the acceptance.<sup>3</sup> This reasoning applies more strongly to cases of acceptance by telegraph (supposing that be the mode of acceptance designated or sanctioned by practice), since there is recourse over to the telegraph company in case by its negligence the acceptance is not communicated.<sup>4</sup> It is on the assumption that in proposals communicated in the ordinary course of business there is an implied agreement to be bound by an acceptance if forwarded promptly by post or telegraph, that we can sustain the numerous rulings in England and the United States, that an acceptance,

<sup>1</sup> *Newcombe v. De Roos*, 2 E. & E. 271; *British Tel. Co. v. Colson*, L. R. 6 Ex. 118.

<sup>2</sup> *Supra*, § 16; *infra*, §§ 545 *et seq.*

<sup>3</sup> *Hallock v. Ins. Co.*, 2 Dutcher, 268.

<sup>4</sup> See *infra*, § 27, for cases. That promises dependent on contingent action of third parties bind, see *infra*, § 593.

whether posted or telegraphed, takes effect from the time when it is forwarded.<sup>1</sup> If it be said that there is no consideration, the answer is that the proposal is: "I will be bound if you will put aside other openings and take this." The consideration is the detriment to the promisee of putting aside other openings.<sup>2</sup> But an acceptance by post, to bind, must be

<sup>1</sup> See remarks of Bramwell, J., Brit. Tel. Co. v. Colson, L. R. 6 Ex. 118; Mellish, J., Harris's case, L. R. 7 Ch. 594; and Blackburn, L. J., in Brogden v. R. R., L. R. 2 App. Ca. 691; Vassar v. Camp, 1 Kern. 441; Trevor v. Wood, 36 N. Y. 307; Howard v. Darley, 61 N. Y. 362; Hallock v. Ins. Co., 2 Dutcher, 268, and cases cited *infra*.

\* See discussion, *supra*, § 13. In Adams v. Lindsell, 1 B. & Ald. 681, the proposal was, "We now offer you 800 tods of weather fleeces," etc., "receiving your answer in course of post." Here the proposal designated the post as the channel of communication. The proposal was misdirected, and hence was late in its arrival; but the plaintiffs, to whom it was addressed, immediately on receiving it, sent an acceptance by post. It was held that this acceptance bound the defendant (the proposer), though he had sold the goods to another party between the date of the receiving of the proposal by the plaintiff and the date of his reception of their acceptance. To the position that the contract is not complete till the acceptance is received, the court replied: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their offer and assented to it; and so it might go on *ad infinitum*. The defendants must be regarded in law as

making, during every instant of time their letter was travelling, the same identical offer to the plaintiff; and then the contract is completed by the acceptance of it by the latter." The position that an acceptance duly posted binds the proposer from the date of posting was afterwards affirmed in the house of lords in Dunlop v. Higgins, 1 H. L. C. 381, a case in which the proposal did not designate the time and mode of acceptance. The acceptance was posted on the same day the proposal was received, though not in time for the first mail that might have been caught; and the letter containing the acceptance was delayed so that it did not arrive until the afternoon of the day in the morning of which it might have been received. It was held that the acceptance bound the proposer, though he had between the forwarding and reception of the letter disposed of the goods. That the acceptance, if thus forwarded promptly, binds has been decided in several subsequent cases. *Infra*, § 20; Duncan v. Topham, 8 C. B. 225; Kennedy v. Lee, 3 Meriv. 452; Stocken v. Collin, 7 M. & W. 515; Townsend's case, L. R. 13 Eq. 148; Wall's case, L. R. 15 Eq. 18; Household Ins. Co. v. Grant, L. R. 4 Ex. D. 216; 27 W. R. 858; 41 L. T. N. S. 298; 19 Am. L. Reg. 298 (qualifying Brit. & Am. Tel. Co. v. Colson, L. R. 6 Ex. 118); Harris's case, L. R. 7 Ch. 587; Brogden v. R. R., L. R. 2 App. Ca. 691. In Household Ins. Co. v. Grant, *ut supra*, it was held that non-delivery of the letter did not vacate the contract if

posted within a reasonable time;<sup>1</sup> and, *a fortiori*, there is no contract when the acceptance is not posted, but is negligently

the letter was mailed. The same rule is adopted in Scotland: Thomson v. James, 18 Dunlop, 1.

In this country, this is, in most jurisdictions, the law in cases in which the acceptance is forwarded without delay. Tayloe v. Ins. Co., 9 How. 390; Minnesota Oil Co. v. Lead Co., 4 Dill. 431; Beckwith v. Cheever, 1 Foster, N. H. 41; Abbott v. Sheppard, 48 N. H. 14; Averill v. Hedge, 12 Conn. 436; Vassar v. Camp, 14 Barb. 341; s. c. 11 N. Y. 441; Clark v. Dales, 20 Barb. 42; Brisbane v. Boyd, 4 Paige, 17; Mactier v. Frith, 6 Wend. 103; Trevor v. Wood, 36 N. Y. 309; Howard v. Daly, 61 N. Y. 362; Potts v. Whitehead, 5 C. E. Green, 58; Hallock v. Ins. Co., 2 Dutch. 268; Hamilton v. Ins. Co., 5 Barr, 339; Wheat v. Cross, 31 Md. 99; Stockham v. Stockham, 32 Md. 196; Chiles v. Nelson, 7 Dana, 282; Hutcheson v. Blakeman, 3 Met. (Ky.) 80; Cornwells v. Krengel, 41 Ill. 394; Levy v. Cohen, 4 Ga. 1; Bryant v. Boose, 55 Ga. 438; Falls v. Gaither, 9 Port. 605; Whiston v. Stodder, 8 Mart. 95; Malpica v. McKown, 1 La. R. 248; Lungstrass v. Ins. Co., 48 Mo. 201.

In Massachusetts, however, it is held that an acceptance by post must, in order to bind, be delivered to the proposer. McCulloch v. Ins. Co., 1 Pick. 278. (But see McIntyre v. Parks, 3 Met. 207.) As also dissenting from English rule, see Gillespie v. Edmonston, 11 Humph. 553. McCulloch v. Ins. Co., however, has not been elsewhere followed. The learned editor of the 3d Am. ed. of Benj. on Sales, § 75, says: "The principle of McCulloch v. Ins. Co. is certainly most positively

controverted by the recent cases of Byrne v. Van Tienhoven, L. R. 5 C. P. D. 344, and Stevenson v. McLean, L. R. 5 Q. B. D. 346," and the case is declared in Hallock v. Ins. Co., 2 Dutch. 268, "to be against the whole current of authorities." On the other hand McCulloch v. Ins. Co. is supported with much acuteness by Prof. Langdell (Cas. Cont. ii. 994). In Lewis v. Browning, 130 Mass. 175, McCulloch v. Ins. Co. is referred to, and the fact that the case is not generally followed is admitted. Gray, C. J., then goes on to say: "But this case does not require a consideration of the general question; for, in any view, the party making the offer may always, if he chooses, render the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance." The question was the subject of elaborate discussion in Household Fire Ins. Co. v. Grant, L. R. 4 Ex. D. 216, Court of App. (July, 1879), where it was held by Thesiger and Baggallay, L. JJ. (Bramwell, L. J., diss.), that the contract binds as soon as a letter of acceptance, properly directed to the proposer, has been posted within reasonable time after receiving the proposal, the post being the ordinary and natural mode of communication in such cases; and that this rule obtains even where the letter never reaches its destination (see note to 32 Am. Rep. 40). In Byrne v. Van Tienhoven, L. R. 5 C. P. D. 344 (cited *supra*, § 11), Lindley, J., said: "It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is complete the mo-

<sup>1</sup> *Supra*, § 9; Maclay v. Harvey, 90 Ill. 525.



held in the hands of an agent to whom it was entrusted by the accepting party, such agent not being the agent also of the proposer.<sup>1</sup>—By the Indian Contract Act, “the communication of an acceptance is complete as against the proposer when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete as against the person who makes it when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is

ment the letter accepting the offer is posted.” He further said: “I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. . . . Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all. This is the view taken in the United States. . . . This view appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question, namely, whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on the 1st of October, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th accepting the offer. It may be taken now as settled, that where the offer is made and accepted by letter sent through the post, the contract is completed the moment the letter accepting

it is posted. . . . When, however, these authorities are looked at, it will be seen that they are based on the principle, that the writer of the offer has expressly or impliedly assented to treat an answer to him duly posted as a sufficient acceptance and notification to himself; or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I find no evidence of any authority in fact given by the plaintiff to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle that compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as a communication to the plaintiff on that day, or on any day before the 20th, when the letter reached him.” See article in *Journal of Jurisprudence and Scottish Law Mag.* for July, 1880, cited *Benj. on Sales*, 3d Am. ed. § 69.

A contract by telegram is complete when the acceptance by telegram is forwarded (*infra*, § 27).

<sup>1</sup> *Thayer v. Ins. Co.*, 10 Pick. 326; *Bryant v. Booze*, 35 Ga. 438; *supra*, § 17.

made when it comes to his knowledge." But according to the above, communication by letter would never be complete, where there is a telegraph by which the letter could be countermanded, until the delivery of the letter, since till then the letter would not be out of the power of the sender. That this, however, was not intended, appears by the following illustration annexed: "B. accepts A.'s proposal by a letter sent by post. The communication of the acceptance is complete as against A. when the letter is posted; as against B. when the letter is received by A."—That a contract does not become binding until the acceptance of the proposal comes to the knowledge of the proposer is maintained by Hasse,<sup>1</sup> Wächter,<sup>2</sup> Bekker,<sup>3</sup> Würth,<sup>4</sup> Mittermaier,<sup>5</sup> Seuffert,<sup>6</sup> and Arndt.<sup>7</sup> Other high authorities argue that a contract is complete on acceptance, some, however, holding that it is sufficient if the acceptance be declared in any way (*e. g.* writing the letter of acceptance), while others hold that it is necessary that the letter of acceptance should have arrived at its place of destination, though not as yet known to the person sending the proposition.<sup>8</sup> The first of these theories has been called the *reception* or *recognition* theory, the other the *declaration* theory. Between these two theories several intermediate positions have been taken. Keller asserts that there can be no fixed rule, but that each case must be governed by the general rule of *bona fides*. Bluhme<sup>9</sup> concedes that the contract is closed as soon as the acceptor puts the accepting letter in the post, and gives the proposer the right of recall down to this point, but gives to the acceptor the right to recall his acceptance at any time before it reaches

<sup>1</sup> Rhein. Mus. ii. p. 371.

<sup>2</sup> Ziv. Arch. xix. p. 116.

<sup>3</sup> Jahr. ii. p. 342.

<sup>4</sup> Des principes de droit qui regissent les lettres, missives, et les télégrammes.

<sup>5</sup> Ziv. Arch. xlv. p. 12.

<sup>6</sup> § 256.

<sup>7</sup> § 231; see Vangerow, § 603. To the same effect, see Merlin, Répertoire, Vente, § 1; Troplong, Vente, i. No. 22; Pardessus, Dr. Com. No. 250; Massé, Dr. Com. No. 578; Fiore, Dr.

int. pr. § 247; cited Wh. Con. of L. § 421; Merlin, cited Lang. Cas. Cont. i. 156.

<sup>8</sup> Wening-Ingenheim, Ziv. Arch. ii. 25; Serafini, il telegrafo in relazione alla giurisp. civ. e commerc.; Hepp, de la correspondance privée postale ou télégraphique, 1864; Muhlenbruch, § 331; Puchta, § 251; Sintenis, § 96; Savigny, Syst. viii. 235; and other authorities cited by Vangerow, *ut supra*.

<sup>9</sup> Ency. Abth. ii. § 266.

the proposer. Windscheid<sup>1</sup> distinguishes between cases where the proposal emanates from the future debtor and those in which it emanates from the future creditor. The first is complete on acceptance; the second is to be regarded simply as a question addressed to the future debtor, in which case it is necessary that the answer should reach the person putting the question.—Vangerow, in discussing the above theories, justly remarks that, unless a proposal is made in definite terms, and in such a shape that an answer of simple acquiescence would form a contract, it is merely tentative, and cannot bind the proposer until the action of the other party is made known to and accepted by him. Supposing, however, a true proposal, in the above sense, be made, then he argues that the contract does not come into existence until the acceptance of the proposal is made known to the proposer. A contract does not exist, until the minds of the parties unite as to a specific act, and to this it is a prerequisite that each knows what the other's mind on the negotiation between them is. This is settled in cases where the parties negotiate face to face; as when one party accepts in a language the other party does not understand;<sup>2</sup> and where the party to whom the acceptance is made is deaf, so that he cannot hear it.<sup>3</sup> The same rule applies to contracts between absent parties. Even supposing an answer accepting a proposal be rightly posted; even supposing it has arrived at its destination; yet, until it has been read by the party addressed, there is no concurrence of minds as to the specific act. It is true that to this view it is objected, that, if it is essential to the contract that the proposer should have notice of its acceptance, then it is also essential to the contract that the existence of this prerequisite should be made known to the acceptor; and so on forever, so that on this theory no contract could be ever complete. But according to Vangerow, since a proposer is bound by his proposal, so far as concerns the other party, until it is withdrawn, and since in the case before us there has been no withdrawal down to the time of the reception of the acceptance by the proposer, then at that time the minds of both contracting parties meet in consent, and the contract is complete.

<sup>1</sup> Pandekt. § 306.

<sup>3</sup> L. I. § 15, de O. et. A. (44, 7).

<sup>2</sup> § 1 J. de V. O. (3, 15).

A class of cases, however, is excepted in which the proposition is so much to the advantage of the party addressed that a formal acceptance is assumed. In such cases the proposer, according to Vangerow, may be supposed to know of the acceptance without notice, and hence the contract is closed on mere acceptance. It is, however, conceded by Vangerow that, though the proposer is not bound contractually until he is advised of the acceptance of his proposal, yet, if he has, by his proposal, given the party addressed the right to expect that a contract will be executed; and if he (the proposer) backs out before notification of acceptance, in such a way that the other party suffers injury, he is bound to compensate for this injury. This liability, however, ceases, when the time is expired within which an acceptance could be expected.—But it is not disputed by Vangerow that it is within the power of a party to agree to bind himself on the posting of a reply; and his admission of liability for negligence on the part of the proposer is based on this concession. The question then is, was there such a promise made by the proposer? If it was, it binds, for the reasons above given. Whether in point of fact such a promise was made is to be determined by the proposal itself, as interpreted by its own context, by the prior dealings of the parties, and by the general course of business at the time. And if the law in any particular jurisdiction be settled to be that posting a letter of acceptance is an acceptance, then promises made in such jurisdiction are presumed to be made subject to such law.<sup>1</sup>

§ 19. It has been said both in England<sup>2</sup> and in this country,<sup>3</sup>

Rule depends on terms of proposal, not on implied agency.

that the proposer is bound by an acceptance when duly posted, on the ground that the post-office is constituted by him his agent for this purpose. But this cannot now be sustained. An agreement to constitute A. as my agent to receive letters cannot

be inferred merely from my appointing him my agent to carry letters. If it could, it would apply to all other modes of delivering letters, and would make it impossible for me to give a letter to an express agent or even to an errand boy without

<sup>1</sup> See Wh. Con. of Laws, §§ 418 *et seq.*

<sup>2</sup> Hebb's case, L. R. 4 Eq. 9.

<sup>3</sup> Tayloe v. Ins. Co., 9 How. 390.

making the messenger an agent to receive as well as to deliver. If good as to messengers, it would be good as to all other forms of agency, and the distinction between special agents and general agents would be obliterated. There is no agency, therefore, to be implied from the mere fact of giving a party a letter to deliver. When, however, the post-office, and the telegraph office, are the usual modes of doing business, and when by local law or local usage an acceptance posted or telegraphed is regarded as adequately communicated, then, in all cases in which a proposal does not designate the mode of acceptance, it may be regarded as implying, that the acceptance will be good if sent by post or telegraph. The risk is one the proposer himself takes.<sup>1</sup>—As we have already seen,<sup>2</sup> the proposer, on the question of time of answer, is bound by his proposal according to its terms. If it contains no limit, then, according to the course of business by which it is to be interpreted, an answer posted or telegraphed to him in reasonable time binds him. If the proposal requires an answer by return mail, then an acceptance put off for two days is too late.<sup>3</sup>

§ 20. So far as concerns the mode in which the acceptor's obligation is to be construed, and in which it is to be performed, the place from which the acceptance is sent is that which supplies the governing law.<sup>4</sup> It is at this place that the purposes of the parties for the first time coalesce. The same rule applies where the proposition is made not in writing, but through a messenger, and where a written contract signed by one party is forwarded to be signed by the other, and where a bill or promisory note is submitted to a party for his signature. In each of these cases, the place where one party assents to the other's proposition is the place of contract, so far as the particular transaction between the two parties is concerned. And if from this

Place of acceptance of proposal is place of contract.

<sup>1</sup> See cases cited *supra*, § 18; Abbott v. Shepherd, 48 N. H. 14; Mactier v. Frith, 6 Wend. 103; Northampton Ins. Co. v. Tuttle, 40 N. J. L. 476. On this topic see examination of cases in Pollock, Wald's ed. 15 *et seq.*; Wald's note, *ib.* 18; Langdell's Cases on Cont. 933 *et seq.*; 22 Alb. L. J. 424.

<sup>2</sup> *Supra*, §§ 9, 15.

<sup>3</sup> Longworth v. Mitchell, 26 Oh. St. 234; Maclay v. Harvey, 90 Ill. 525; See *supra*, § 15, and prior cases in this section.

<sup>4</sup> As to place of performance, see *infra*, § 871.

and other circumstances we can infer that the place of such acceptance was regarded by the parties as the place where the matter was to be determined, then the law of such place is the *lex loci contractus*, and is also the *lex loci solutionis*, so far as concerns the acceptor's liability.<sup>1</sup> At the same time while the admission of a debt contained in a letter is sufficiently made at the place of posting, it is continuous in its effect until it reaches its destination, and may be considered as also made there.<sup>2</sup> So far, however, as concerns the mode of performing a contract, the law to which it is subject is the law of the place of performance.<sup>3</sup>—The performance of the contract is to be in the place assigned by the contract,<sup>4</sup> though when no place is designated, it is to be inferred from all the circumstances of the case.<sup>5</sup>

§ 21. The time of acceptance, as above fixed, determines the date of the contract.<sup>6</sup> Until such acceptance, the buyer has no insurable interest;<sup>7</sup> nor can he until acceptance, maintain an action for injury to the goods.<sup>8</sup> When the acceptance is implied in the performance of the consideration, then the time of the contract is the time of the performance of the consideration.<sup>9</sup> It is true that it has been argued that the acceptance relates back in time to the proposal.<sup>10</sup> But it is impossible to see how a contract can be made, so far as third parties are concerned, to relate back to a period when it did not exist.<sup>11</sup>—As will hereafter be seen, money obligations without date, are payable on demand;<sup>12</sup> while a party disabling himself from performance may be made

<sup>1</sup> Wh. Con. of Laws, § 421, and cases there cited; *Newcomb v. DeRoos*, 2 E. & E. 270; *Dunlop v. Higgins*, 1 H. L. C. 381; *Taylor v. Jones*, L. R. 1 C. P. D. 87; *Taylor v. Nicholls*, L. R. 1 C. P. D. 242; *Chapman v. Cottrell*, 3 H. & C. 865; *Tuttle v. Holland*, 43 Vt. 542; *Webber v. Donnelly*, 33 Mich. 469.

<sup>2</sup> Leake, 2d ed. 49, citing *Evans v. Nicholson*, 45 L. J. C. P. D. 111, n. 4; 32 L. T. N. S. 778; *Taylor v. Nicholls*, L. R. 1 C. P. D. 242.

<sup>3</sup> Wh. Con. of L. § 486; *infra*, § 874.

<sup>4</sup> *Infra*, § 871.

<sup>5</sup> *Infra*, § 872.

<sup>6</sup> *Supra*, § 15 *et seq.*

<sup>7</sup> *Stockdale v. Dunlop*, 6 M. & W. 224; *Seagrave v. Marine Co.*, L. R. 1 C. P. 305; *Taylor v. Jones*, L. R. 1 C. P. D. 87.

<sup>8</sup> *Felthouse v. Bindley*, 11 C. B. N. S. 869.

<sup>9</sup> See *supra*, § 17.

<sup>10</sup> *Kennedy v. Lee*, 3 Mer. 441; *Dickinson v. Dodds*, L. R. 2 Ch. D. 463.

<sup>11</sup> See Lang. Sum. § 10.

<sup>12</sup> *Infra*, § 881.

liable to suit before the time fixed.<sup>1</sup>—When time is essential, also, stipulations respecting it will be enforced.<sup>2</sup>—A nominal date will be presumed to be real, though it may be varied by parol proof.<sup>3</sup>

§ 22. To bind the party to whom the proposal is addressed, it is necessary that his assent should be definite to go to the proposal specifically.<sup>4</sup> One party cannot bind another by sending goods to him and saying, “if you do not refuse these goods you are bound for them.” Mere inaction after such reception does not constitute a contract that binds the sendee.<sup>5</sup> The proposal, in order to fix the party addressed with an admission, must be of a definite character he is bound to answer.<sup>6</sup> In the same light are to be considered services accepted as courtesies or as family attentions.<sup>7</sup> In any view, a mere proposal, unassented to, forms no contract.<sup>8</sup> At the same time, as we have already seen, a person who knowingly encourages another to do for him work which is usually paid for as a matter of business, becomes liable to pay such other person for the work.<sup>9</sup>—Under this head may be noticed cases in which a proposal contains

Assent  
must be de-  
finite; mere  
non-refusal  
not enough

<sup>1</sup> *Infra*, § 885*a*.

<sup>2</sup> *Infra*, § 887.

<sup>3</sup> *Infra*, § 893.

<sup>4</sup> That there must be some act of acceptance see *White v. Corlies*, 46 N. Y. 467. See *infra*, §§ 184, 707 *et seq.*

<sup>5</sup> *Pollock*, 3d ed. 25; *Felthouse v. Bindley*, 11 C. B. N. S. 869; *Corning v. Colt*, 5 Wend. 253; and cases cited *infra*, § 184. In *Felthouse v. Bindley*, 11 C. B. N. S. 869, the proposal was to buy A.'s horse for £30, adding, “if I hear no more about him I consider the horse is mine at £30 15s.” The mere non-answering of this letter was held not to constitute a contract. See *Leake*, 2d ed. 28.—On the other hand, “acceptance by the grantee, of a deed or land contract, executed by the grantor only, binds such grantee.” *Lyons, J. Hubbard v. Marshall*, 50 Wis. 327; citing *Lowber v. Connit*, 36 Wis.

176. See *supra*, § 6. That mere loose talk cannot constitute proposal and acceptance, see *Bruce v. Bishop*, 43 Vt. 161, *supra*, § 3. That when a price is agreed on for a club supper, the club cannot be charged with extras furnished, see *Eaton v. Gay*, 44 Mich. 431.

<sup>6</sup> *Supra*, § 3; *Corser v. Paul*, 41 N. H. 24; *Mattocks v. Lyman*, 18 Vt. 98; *McGregor v. Wait*, 10 Geary, 72; *Bartholomew v. Jackson*, 20 Johns. 28; *Borland v. Guffey*, 1 Grant Cas. 394, and other cases cited, Wh. on Ev. § 1138. As to interpretation see *infra*, §§ 627 *et seq.*

<sup>7</sup> *Infra*, § 719.

<sup>8</sup> *Taylor v. Laird*, 25 L. J. Exch. 329; *Corning v. Colt*, 5 Wend. 253; *Bower v. Blessing*, 8 S. & R. 243; and see *infra*, §§ 707 *et seq.*

<sup>9</sup> *Supra*, § 7; and see *infra*, §§ 184, 707, *et seq.*

conditions printed in such a way as to elude the attention of the acceptor. A party is not bound by a condition, thus, without express notice to him, slid covertly into a contract in such a way as to materially modify what would be its ordinary meaning. Hence, when a condition materially limiting liability is inserted in a railway ticket or receipt, such a condition, if not brought to the notice of the other party, and if not put in such a way as to attract his attention, will not bind him. It is only as to the matter in respect to which his mind and that of the carrier met that he is bound.<sup>1</sup> And even if notice be brought home to him, yet if it be against the policy of the law, as are all unreasonable releases of common carriers from the duty of care, the limitation will not bind.<sup>2</sup> The rule that a party is presumed to know the contents of a document assented to by him,<sup>3</sup> does not make it my duty to inform myself of provisions inserted in an informal contract in such a way as to elude ordinary attention. I am required to exercise the sagacity of a good business man; and I am only chargeable with negligence when I omit to exercise such sagacity. That which a good business man would not ordinarily perceive, I am not chargeable with negligence in not perceiving. Besides, to impute to me a knowledge of conditions inserted, not in the body of a document, where I would be likely to see them, but in places where they would not be likely to attract my attention, would make a maxim which was designed to prevent fraud an engine of fraud, by enabling one party to surreptitiously work into a contract conditions of which the other party was not likely to take notice. And this inference grows stronger when the condition is one repugnant to the body of the contract. We are not required to look for a sweeping abrogation of a book contract in a few small lines inserted in its margin or on its back. The contract, if the carrier meant to make it special, should have been constructed as a special

<sup>1</sup> *Infra*, § 572; Wh. on Neg. § 587; Sands, 54 N. Y. 512; and other cases Harris v. R. R., L. R. 1 Q. B. D. 515; cited, *infra*, § 572.

Parker v. R. R., L. R. 1 C. P. D. 618; <sup>2</sup> See *infra*, § 438. As to telegraph limitations see Wh. on Neg. § 761.

Burke v. R. R., L. R. C. P. D. 1; Malone v. R. R., 12 Gray, 388; Verner v. <sup>3</sup> *Infra*, § 196.

Switzer, 32 Penn. St. 208; Elmore v.



contract. We have a right to suppose that matters apparently minor inserted in a contract relate to subordinate specifications, and we are not called upon to look to them to see whether they give the contract a shape repugnant to what it purports to be on its face. In proportion, therefore, to the repugnancy of such conditions to the body of the contract, is the inference strengthened that they were not seen.<sup>1</sup> Whether there is notice in such cases is a question of fact.<sup>2</sup>

§ 23. An exception to the maxim that a proposal must be accepted to be binding, is supposed to be found in the common law rule that a grant under seal binds the grantor, if held as an escrow, or delivered to a third party, though not communicated to the grantee.<sup>3</sup> But this exception is more nominal than real. Such a deed, when placed in the hands of a third party on conditions, is a proposal to the grantee that he should take the property as from the date of the delivery. The acceptance establishes the contract as thus stated.<sup>4</sup>

Grants under seal may bind grantor without communication to grantee.

§ 24. It is not necessary to the validity of a contract, that the party to whom the proposition is addressed should be specified in it by name. I may bind myself contractually by a general proposal to do a particular thing for the benefit of any person who renders me a particular service, or takes part with me in a common risk. Under this head fall offers of rewards to any person finding a lost article, and offers to receive as a stockholder in a particular company any person subscribing and paying an instalment by a particular time. A proposition of this kind is called, by German authors, *Auslobung*, and is defined to be a public announcement, that to any person performing a particular service, a designated benefit will be given in return. Although in the classical Roman law, assuming, as it did, that to a contract it is essential that

General proposal binds as to all parties taking action in conformity with its terms.

<sup>1</sup> See *infra*, § 438, to the effect that such releases are against the policy of the law. That written terms, when in conflict with printed, prevail, see *infra*, § 652. That as a rule ignorance of fact is a defence, see *infra*, §§ 185 et seq.

<sup>2</sup> *Infra*, § 572.

<sup>3</sup> *Garnons v. Knight*, 5 B. & C. 671; see *Xenos v. Wickham*, L. R. 2 H. L. 296; *Woodbury v. Fisher*, 20 Ind. 387.

<sup>4</sup> See *infra*, § 679. As to agreement by vendee to pay burdens on land, see *infra*, § 720.

there should be parties specified on its face, contracts based upon general proposals were unknown, such contracts are universally admitted by modern Roman jurists to be of binding force.<sup>1</sup> The proposal is regarded as a bid which becomes a contract when acted on by a party within the range of those to whom it is addressed. There is, therefore, an important distinctive feature of proposals thus directed to persons of a particular class, as distinguished from persons designated individually. Proposals of the general character now before us are conditioned, so far as their efficiency is concerned, upon something being done by the party accepting them.<sup>2</sup> It is not enough that there should be a mere acceptance. The service (*Leistung*) called for, must be performed.<sup>3</sup> Thus, an offer of a reward on returning stolen property is not binding until the stolen property is returned; an offer of membership in a stock company is not consummated until the first instalment required in the offer is paid. It is performing the condition, and not technically accepting the offer, that makes the contract between the party making the proposal and the party acting on it. Until the performance of its condition, the offer is a mere proposal; but when this condition is performed by an ascertained person, the contract is complete.<sup>4</sup> There can, however, be no recovery except by a party who had notice of

<sup>1</sup> Vangerow, § 603, iii. 255; Ihering, *Jahr.* iv. p. 93; Windscheid, § 309.

<sup>2</sup> Anson, *op. cit.* 25.

<sup>3</sup> Jones v. Bank, 8 N. Y. 228; Furman v. Parke, 1 Zab. 310.

<sup>4</sup> *Supra*, § 17; Anson, 24, adopted in Pollock, 3d. ed. 12; 1 Ch. Cont. 11th Am. ed. 11; Williams v. Carwardine, 4 B. & Ad. 621; Gerhard v. Bates, 2 E. & B. 476; Neville v. Kelly, 12 C. B. N. S. 740; Turner v. Walker, L. R. 2 Q. B. 301; Spencer v. Harding, L. R. 5 C. P. 563; Shuey v. U. S., 92 U. S. 73; Janvrin v. Exeter, 48 N. H. 83; Davis v. Munson, 43 Vt. 676; Russell v. Stewart, 44 Vt. 170; Freeman v. Boston, 5 Metc. 56; Loring v. Boston, 7 Metc. 409; Crawshaw v. Roxbury, 7 Gray, 374; Kincaid v. Eaton, 98 Mass. 139;

Crocker v. R. R., 24 Conn. 261; Kelly, *in re*, 39 Conn. 159; Fitch v. Snodaker, 38 N. Y. 248; Howland v. Lowndes, 51 N. Y. 604; Grady v. Crook, 2 Abb. (N. C.) 53; Furman v. Parke, 1 Zab. 310; Cummings v. Gann, 52 Penn. St. 484; Goldsborough v. Cradie, 28 Md. 477; Eagle v. Smith, 4 Houston, 293; Gilmore v. Lewis, 12 Ohio, 281; Montgomery v. Robinson, 85 Ill. 174; Hanson v. Pike, 16 Ind. 140; Hayden v. Souger, 56 Ind. 42; Stamper v. Temple, 6 Humph. 113; Morrell v. Quarles, 35 Ala. 544; Salbadore v. Ins. Co., 22 La. An. 338. See Stamp v. Cass Co., 11 N. W. Rep. 183. That on this ground the right of holders of negotiable paper to sue on such paper may be sustained, see *infra*, § 795. This applies to rules posted

the proposal when he rendered the service. If there could, we would have a contract without two contracting parties. The proposer must make the proposal known before the acceptor undertakes to perform the condition, and the acceptor must have the reward in view at the time he renders the services on which he claims.<sup>1</sup>—Suppose, that to an advertisement of a

in factories, which bind the employer to the employés taking action in conformity with rules; *Wright v. Trainer*, 1 Weekly Notes, 198; 32 Leg. Int. 264.

“To a certain extent,” says Mr. Pollock (3d. ed. 19), “this notion of a floating obligation” (*i. e.*, that by the offer there is a contract established with an unascertained promisee) “is countenanced by the language of the judges in the cases above discussed; and it also receives some apparent support from the much earlier case of *Williams v. Carwardine*, 4 B. & Ad. 621. . . . The decision sets up a contract without any *animus contrahendi*. If it be now law (which may be doubted), it goes to show that in this class of cases, there may be an acceptance constituting a contract without any communication of the proposal to the acceptor, or of the acceptance to the proposer. But the statement of Parke, J., that ‘there was a contract with any person who performed the condition mentioned in the advertisement,’ is rather ambiguous; it savors of the notion, that there is an inchoate or unascertained obligation from the first publishing of the offer. And if such were indeed the *ratio decidendi*, we need not hesitate to say, that at the present day it cannot be maintained. The modern cases not already cited have turned only on the question whether the party claiming the reward performed the required condition according to the terms of the advertisement.”

That there may be a claim for damages based on negligence in mak-

ing a general proposal, see *infra*, § 1054.

It was maintained by the Supreme Court of the United States, in *Shuey v. U. S.*, 92 U. S. 73, that a general proposal made by public advertisement may be revoked by an advertisement of equal publicity, even as against a person who acts on the proposal not knowing it has been revoked. Of this, Mr. Pollock says: “this is, perhaps, a convenient rule, and may possibly be supported as a fair inference of fact from the habits of the newspaper reading part of mankind; yet it seems a rather strong piece of judicial legislation.” So far as concerns the admissibility of newspapers to prove notice, the ruling of the Supreme Court is sustained by a series of cases cited in Wh. on Ev. § 673. As to revoking offer to sell tickets, see *Crocker v. R. R.*, 24 Conn. 249. *Shuey v. U. S.* can be sustained on the ground, that the party claiming the reward was to be presumed to have known of the revocation before he supplied the consideration. The revocability of a proposal of this class, up to the period of the rendering of the consideration, is maintained in *Janvrin v. Exeter*, 48 N. H. 83; *Wentworth v. Day*, 3 Met. 352; *Gilmore v. Lewis*, 12 Ohio, 282. That after a reasonable time, an offer of a reward is inferred to be withdrawn, see *Loring v. Boston*, 7 Met. 409.

<sup>1</sup> See cases cited *supra*; but see *contra*, *Russell v. Stewart*, 44 Vt. 170; *Auditor v. Ballard*, 9 Bush, 572. In *Williams v. Carwardine*, 4 B. & Ad. 621; it was held that the defendant was

reward on the discovery of lost property, two or more claimants with equal rights appear; or, suppose, that a certain amount of stock is offered to all persons subscribing a specified sum, and it turns out that there are more persons subscribing and paying in than there is stock to satisfy: in what way are the claimants in such cases to be met? So far as concerns the parties applying for a reward, it has been held in Germany, that, if they stand in precisely the same position, the reward is to be divided between them.<sup>3</sup> A similar principle may be invoked to determine cases in which there are more persons subscribing and paying in on stock allotments than there is stock to satisfy.—Where a portion of the thing lost is found and restored, the reward may, it is held, be apportioned.<sup>2</sup>

§ 25. Under the same head may be classed time-tables issued by railway companies, which bind the companies to reasonable punctuality;<sup>3</sup> and which, so it has been argued, make the companies liable for any damage received by a party from a failure on their part to keep the time advertised by them. It has even been held in England<sup>4</sup> that, when a traveller offers to take a ticket to any place to which a railroad company has advertised to carry passengers, the company contracts with him to receive him as a passenger to that place according to the advertisement. But this view, as expressed by Lord Campbell, C. J., and Wightman, J., was not necessary to the decision of the case, and was dissented

liable on a general promise of a reward for certain information, which information the plaintiff supplied, though the reward was not the controlling motive which induced the plaintiff to supply the information. But in *Fitch v. Suedaker*, 38 N. Y. 248, it was held, that, when the information called for was given by the plaintiff before he had notice of the reward, he could not claim the reward, as he could not be held to accept an offer of which he had no knowledge. And in *Hewitt v. Anderson*, 56 Cal. 546, it was held that the claimant must have rendered the ser-

vices with the intention of claiming the reward. But the cases do not necessarily conflict, as in *Williams v. Carwardine* it does not appear that the plaintiff was not aware of the reward. See *infra*, § 507.

<sup>2</sup> *Vangerow*, § 603, iii. 285.

<sup>3</sup> *Symmes v. Frazier*, 6 Mass. 544.

<sup>4</sup> *Leake*, 2d ed. 25; *Amson*, *ut supra*, citing *Le Blanche v. R. R.*, 1 C. P. D. 286; and see *Gordon v. R. R.*, 52 N. H. 596; *Sears v. R. R.*, 14 Allen, 433; *Strohn v. R. R.*, 23 Wis. 126; *Thompson v. R. R.*, 50 Miss. 316; *Wh. on Neg.* §§ 662, 810.

<sup>4</sup> *Denton v. R. R.*, 5 E. & B. 860; a

from by Crompton, J.—It is clear that where there is a ticket actually sold there is a contract to punctuality which binds the company,<sup>1</sup> though only to reasonable diligence and exactness.<sup>2</sup>—A company may withdraw an offer of this class by closing its office or other modes of notice.<sup>3</sup>

§ 25 a. Circular letters, with no specific drawee mentioned, may be placed in the same category. There is a pro-<sup>So of letters of credit.</sup>posal, and when the conditions of the proposal are complied with, there is an acceptance.<sup>4</sup> A written promise, also, to accept a bill binds the promisor to any persons who may *bona fide* take the bill on the faith of the promise.<sup>5</sup> And it is further held that a promise by P. to accept any bills that D. may draw binds P. to any person who buys D.'s bills on faith of P.'s promise.<sup>6</sup> These rulings may be explained on the ground that the payee acts as the agent of the drawer, and the medium of completing the contract. By Mr. Pollock<sup>7</sup> the explanation is that the "undertaking must be considered as addressed to any one who shall so advance money." The case is analogous, in that view, to a general proposal to any one

fuller report appearing in 25 L. J. Q. B. 129.

<sup>1</sup> Hamlin v. R. R., 1 H. & N. 408.

<sup>2</sup> Gordon v. R. R., 52 N. H. 596.

<sup>3</sup> Crocker v. R. R., 24 Conn. 249; see as to right to revoke, Shuey v. U. S., 92 U. S. 73, cited *supra*, § 24.

<sup>4</sup> Asiatic Banking Co. *ex parte*, L. R. 2 Ch. 391; Maitland v. Bank, 38 L. J. C. 363; though see Scott v. Pilkington, 2 B. & S. 11. As to whether a guarantor is entitled to notice of acceptance by guarantee, see *infra*, § 570. Any one may act upon a letter of credit when it is generally addressed. Birckhead v. Brown, 5 Hill, 634, 2 Denio, 375; Wheeler v. Mayfield, 31 Tex. 395; Mayfield v. Wheeler, 37 Tex. 256; Drummond v. Prestman, 12 Wheat. 515; Lowry v. Adams, 22 Vt. 160. When it is sent to A. with intent that it should be shown to B. to induce B. to act on it, it may be sued on by B. Lonsdale v. Bank, 18 Ohio, 126. Where B. sent a

letter of credit to D., as follows: "As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guaranty the payment of any bills which you may make under the letter of credit in Baltimore not exceeding \$1500;" it was held that a party advancing goods to D. on this letter could sue B. as guarantor. Griffin v. Rembert, 2 Rich. S. C. L., N. S. 410; and see Manning v. Mills, 12 Up. C. Q. B. 515, cited Brandt, Suretyship, § 96.

<sup>5</sup> Coolidge v. Payson, 2 Wheat. 66; Boyce v. Edwards, 4 Pet. 111; Central Bank v. Richards, 109 Mass. 413; Greele v. Parker, 5 Wend. 414.

<sup>6</sup> Barney v. Newcomb, 9 Cush. 46; Bank of La. v. Coster, 3 N. Y. 203; Lonsdale v. Bank, 18 Ohio, 126; Dorlan v. Mulhollan, 10 Ohio St. 192; Nelson v. Bank, 48 Ill. 36; and cases cited, Wall's Pollock, 136.

<sup>7</sup> Op. cit. 3d ed. 21.

who should do a particular act, and the acceptance is the doing of that act in conformity with the proposal.

§ 25*b*. In the same relation are to be considered auction sales, in respect to which it has been held that a mere announcement of an auction sale at a particular day does not bind the auctioneer to sell on that day;<sup>1</sup> but that advertisements of sales without reserve mean "that neither the vendor nor any other person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum be equivalent to the real value or not."<sup>2</sup> The reason for the distinction between announcements of sales and announcements of sales without reserve, is thus stated by Sir W. Anson<sup>3</sup>: "The substantial difference between the cases seems to lie in this, that not merely the number, but the intentions of the persons who might attend the sale must be unascertainable; nor could it be certain that their legal relations would be eventually altered by the fact of their attendance. A. might come, intending to buy, but might be outbid. B. might come with a half-formed intention of buying if the goods went cheaply. C. might come merely for his amusement. It would be impossible to hold that an obligation could be established between the auctioneer and this indefinite body of persons, or that their losses could be ascertained so as to make it reasonable to hold him liable in damages. The highest bidder, on the other hand, is an ascertained person, fulfilling the terms of a definite offer. This distinction, therefore, bears out the propositions laid down at the commencement of this discussion."<sup>4</sup> The offer of a party desiring

<sup>1</sup> *Harris v. Nickerson*, L. R. 8 Q. B. 286.

<sup>2</sup> *Warlow v. Harrison*, 1 E. & E. 295; in Ex. Ch. 1 E. & E. 309. In this case *Watson and Martin, BB.*, and *Byles, J.*, held that the case was not to be distinguished from that of a reward offered by advertisement, or of a statement in a time-table, holding that in such case the contract is completed by the bidding itself, subject to the condition that no higher *bona fide* bidder appear. See criticism in *Pollock*, 3d ed. pp. 16 *et*

*seq.* As to mode of signifying proposal and acceptance, see *supra*, § 6. As to the employment of puffers at auctions, see *infra*, § 267; as to agreements to suppress competition at auctions, *infra*, § 443.

<sup>3</sup> *Cont.* p. 28.

<sup>4</sup> *Mr. Pollock* holds the dicta in *Warlow v. Harrison*, as above stated, to "overstep the true principles of contract." *Pollock*, 3d ed. 18. As to offer to subscribe to charities, see *infra*, § 528.

to buy at auction, as we have seen, is made sometimes by a bid, sometimes by a nod in approval of a price suggested by the auctioneer; and the falling of the hammer indicates the auctioneer's acceptance of the proposal, which can be withdrawn until the hammer falls.<sup>1</sup> "A bid at a sheriff's sale, before the hammer falls, is like an offer before acceptance. In such a case there is no contract, and the bid may be withdrawn without liability or injury to any one."<sup>2</sup> Nor can a sheriff impose any limitation on this right.<sup>3</sup>

§ 26. From general proposals for interchange of services are to be distinguished bids for customers. A merchant may advertise to sell a particular article at a particular price. This, however, does not bind him to sell to all persons who may apply. A contractor bids for labor, but he is not bound to take all persons who offer to serve him on the terms he mentions. A landlord advertises to lease his house at a fixed price, but he is not bound to accept as a tenant any person offering to take the house at the rent specified. The distinction between advertisements of this class and proposals is that the advertisement is conditioned on the party advertising continuing able to make good his announcement, and on the person applying being acceptable; the proposal, on the other hand, makes a specified offer, by which, if accepted, the proposer is bound. Hence an advertisement offering goods for sale by tender, does not imply a promise to sell to the highest bidder, when such an offer is not expressly made;<sup>4</sup> and the advertisement of a sale at auction does not, as we have seen, bind the auctioneer to put up all the property advertised.<sup>5</sup> It is true that where there is a definite offer of shares from a company, or a prior

From general proposals are to be distinguished bids for customers.

<sup>1</sup> *Payne v. Cave*, 3 T. R. 148; *Sweeting v. Turner*, L. R. 8 Q. B. 310; *Fisher v. Seltzer*, 23 Penn. St. 308; *Grottenkemper v. Achtermayer*, 11 Bush, 222; *supra*, § 6.

<sup>2</sup> *Lewis, C. J., Fisher v. Seltzer*, 23 Penn. St. 310.

<sup>3</sup> *Ibid.* Mr. Langdell, Sum. Cont. § 19, doubts the conclusion in *Payne v. Cave*, and argues "that the true view seems

rather to be that the seller makes the offer when the article is put up, namely, to sell to the highest bidder; and that when a bid is made there is an actual sale, subject to the condition that no one else shall bid higher."

<sup>4</sup> *Spencer v. Harding*, L. R. 5 C. P. 561.

<sup>5</sup> *Harris v. Nickerson*, L. R. 8 Q. B. 286.

definite agreement in respect to them, the application for the shares in pursuance of the offer or agreement may make a complete contract without any further notice of allotment.<sup>1</sup> But a general offer of stock or other commodity to bidders is to be construed as reserving to the parties advertising a discretionary power in the acceptance of bids.<sup>2</sup>

§ 27. Telegrams may be employed either to propose or to accept, and become, in either case, part of the evidence by which a contract can be established.<sup>3</sup> The original written proposal or acceptance by telegraph is a sufficient memorandum in writing under the statute of frauds; but to satisfy the statute the writing must be signed by the party charged. When so signed, and assented to orally by the other side, it constitutes a contract of sale under the statute;<sup>4</sup> supposing that it adequately expresses the terms of the proposal or acceptance, as the case may be.<sup>5</sup> To satisfy the statute, it has been held that the original message must be produced.<sup>6</sup> But in those jurisdictions in which the telegraph company is the agent of the sender, the message as delivered by the company must be regarded as the message of the sender, under the statute, and if duly signed or attested by the company must be regarded as duly signed or attested

<sup>1</sup> See *Adam's case*, L. R. 13 Eq. 474; 591; *Saveland v. Green*, 40 Wis. 431; *Hamilton's case*, L. R. 8 Ch. 548; *Hamley's case*, L. R. 5 C. D. 705; *Jenner's case*, L. R. 7 C. D. 132.

<sup>2</sup> *Spencer v. Harding*, L. R. 5 C. P. 561; *Thetcher v. England*, 3 C. B. 254; *Turner v. Walker*, L. R. 1 Q. B. 641; 2 Q. B. 301.

<sup>3</sup> Wh. on Ev. §§ 67, 618; *Williamson v. Freer*, L. R. 9 C. P. 393; *Coupland v. Arrowsmith*, 18 L. T. (N. S.) 755; *Henkel v. Pape*, L. R. 6 Ex. Ch. 7; *Unthank v. Ins. Co.*, 4 Biss. 357; *Minn. Oil Co. v. Lead Co.*, 4 Dill. 431; *Durkee v. R. R.*, 29 Vt. 127; *Trevor v. Wood*, 36 N. Y. 306; *Beach v. R. R.*, 37 N. Y. 457; *Leonard v. Tel. Co.*, 41 N. Y. 544; *Benford v. Sanner*, 40 Penn. St. 9; *Robinson Works v. Chandler*, 56 Ind. 575; *Matteson v. Noyes*, 25 Ill.

<sup>4</sup> Wh. on Ev. §§ 617, 872; *Godwin v. Francis*, L. R. 5 C. P. 295; *Reuss v. Pickley*, L. R. 1 Ex. 342; *Coupland v. Arrowsmith*, 18 L. T. (N. S.) 755; *Unthank v. Ins. Co.*, 4 Biss. 357; *Dunning v. Roberts*, 35 Barb. 463; *Crane v. Maloney*, 39 Iowa, 39; *Wells v. R. R.*, 30 Wis. 605; see *Stevenson v. McLean*, L. R. 5 Q. B. D. 346.

<sup>5</sup> *Trevor v. Wood*, 36 N. Y. 307; *McElroy v. Bush*, 35 Mich. 434; *Saveland v. Green*, 40 Wis. 431.

<sup>6</sup> *Durkee v. R. R.*, 29 Vt. 127. That this is the English rule may be inferred from *Henkel v. Pape*, L. R. 6 Ex. 7.



by the sender.<sup>1</sup>—A party may agree to make a contract dependent on receipt of telegram, and such contract is binding on a telegraphic acceptance.<sup>2</sup>—Whether the sender of a telegram makes the telegraph company his agent so that he becomes responsible for the message delivered by the company at its place of destination, has been much discussed. In England, in a case in which, after some negotiations for the purchase of “fifty” rifles, a telegram ordering “three” rifles was delivered so as to read “the rifles,” so that fifty rifles were sent by the plaintiff (the receiver of the telegram) to the defendant (the sender of the telegram), it was held that the company was not to be regarded as the agent of the sender, and that therefore the plaintiff could not recover.<sup>3</sup> In this country, however, the prevalent opinion is that the sender is bound by the message as delivered by the telegraph company,<sup>4</sup> though where no agency on the part of the telegraph company is established, the original must be produced, or its loss explained.<sup>5</sup> It has been objected that this, in consequence of the numerous mistakes incident to the transmission of letters by telegraph, exposes the sender of telegrams to undue risk; and no doubt blunders in the transmission of telegraphic messages are serious and constant.<sup>6</sup> But to this may be given the following answers. (1) The mistakes of agents charged orally with specific duties are likely to be far more numerous and more serious than those of telegraphic operators charged with the transmission of messages, and if we refuse to impute to the principal the blunders of telegraphic agents, there is no blunder of other agents that can be so imputed. (2) To relieve tele-

<sup>1</sup> *Hawley v. Whipple*, 48 N. H. 487; *Dunning v. Roberts*, 35 Barb. 463; *Trevor v. Wood*, 36 N. Y. 307. A telegram in the words, “you may draw on me for \$700,” is not an acceptance of a bill in the technical sense, but it is an authority to draw at sight, and involves a promise to accept and pay, *Franklin Bank v. Lynch*, 52 Md. 270.

<sup>2</sup> *Household Ins. Co. v. Grant*, L. R. 4 Ex. D. 223; *Lewis v. Browning*, 130 Mass. 195.

<sup>3</sup> *Henkel v. Pape*, L. R. 6 Ex. 7.

<sup>4</sup> *Durkee v. R. R.*, 29 Vt. 127; *Dunning v. Roberts*, 35 Barb. 463; *Trevor v. Wood*, 36 N. Y. 307; *Crane v. Maloney*, 39 Iowa, 39; *Saveland v. Green*, 40 Wis. 431; *Taylor v. St. Robt. Campbell*, 20 Mo. 254; *Scott & J. on Tel.* § 345.

<sup>5</sup> *Wh. on Ev.* § 1128; *Benford v. Sanner*, 40 Penn. St. 9; *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 682.

<sup>6</sup> See article in *Blackwood's Mag.* for April, 1881, Eng. ed. vol. 129, p. 468. See *infra*, § 1056.

graphic communications from the restrictions of the law of agency would be to expose the business of the country to a far greater peril than it is exposed to by treating the operator as the sender's agent. It is only by insisting on this agency, and then holding the company responsible to the sender under the law of agency, that general accuracy can be secured.<sup>1</sup> — It follows, also, from what has been stated, that the deposit of an acceptance in a telegraphic office, duly addressed to a proposer by telegram, is a due acceptance of the proposal, although never received by the proposer, supposing the acceptance to follow within reasonable time. It is true that this has been doubted in England;<sup>2</sup> but in cases where the proposer has selected a telegraphic company as his agent in making his proposal, or where he by letter authorizes his correspondent to reply by telegraph, there is good reason on principle to hold that it is sufficient if the acceptance be deposited in due time with the telegraphic company.<sup>3</sup> That this is the case in respect to letters has been already seen.<sup>4</sup>

§ 28. Much difficulty, as we will hereafter see, has arisen from the inexact use, in decisions referring to contracts, of the words "void" and "voidable." A contract is executed under the influence of fraud, the parties being competent to agree as to the subject matter of the contract, and actually agreeing. It is subsequently set aside, on account of the fraud by which the assent of one of the parties was induced. The court, in pronouncing the avoidance of the contract, declares that it is "void." In one sense it is, after it is avoided. But the term "void contract" (contradictory as the expression is, since, if it was a "contract" it was not always "void," and if it was always "void" it never was a "contract") implies, that a "contract"

<sup>1</sup> In England, where the message is delivered to the wrong person, the receiver has no remedy against the company, *Dickson v. Tel. Co.*, L. R. 2 C. P. D. 62; *aff. on app.* 2 C. P. D. 1; — though it is otherwise in this country, *Wh. on Neg.* § 758. That the *sendee* has no claim for non-delivering, see *Wh. on Neg.* § 757.

<sup>2</sup> See *supra*, § 18. *Willes, J., Godwin v. Francis*, L. R. 5 C. P. 295.

<sup>3</sup> *Wh. on Ev.* § 1128; *Minnesota Linseed Oil Co. v. Lead Co.*, 4 Dill. 431; *Durkee v. R. R.*, 29 Vt. 127; *Trevor v. Wood*, 36 N. Y. 307; see 12 Cent. L. J. 365.

<sup>4</sup> *Supra*, § 18.

never existed between the parties, whereas in fact a contract did exist between the parties, though it was afterwards avoided. On the other hand, the term “voidable” is often used in reference to apparent agreements which are not real agreements, and which are, therefore, not contracts at all. Now the true distinction is not, as is sometimes said, that a voidable contract is a contract with only one party to it (since there can be no contract without two contracting parties<sup>1</sup>), but that it is an agreement which one of the parties is at liberty, on some future contingency, to treat as if it were not binding.<sup>2</sup>—The term “void,” on the contrary, can in strictness only be applied, in this connection, to transactions which are either (1) absolutely prohibited by law, or (2) wanting in one of the necessary constituents of a valid agreement, *i. e.*, two parties capable of consenting, or a concurrence of minds as to a particular object of consent.<sup>3</sup>—While such, however, is the

<sup>1</sup> *Supra*, § 2.

<sup>2</sup> That contracts of infants are at common law, in this sense, voidable, see *infra*, §§ 31, 55, 56; that contracts of lunatics are thus voidable, see §§ 114 *et seq.*, 117*a*; that it is so as to duress, see § 154; that it is so as to agreements induced by fraud, see *infra*, § 283; that, on the other hand, there is no contract when the parties do not agree as to the same thing, see *supra*, § 4, *infra*, § 177; and see, generally, Rounsavell *v.* Pease, 45 Wis. 506.

The distinction given by Mr. Pollock (3d ed. 7) is substantially that of the text. “An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no person’s rights, whether he be a party or a stranger, are affected. A *voidable* act, on the contrary, takes its full, proper, and legal effect, unless and until it is disputed and set aside

by some person entitled so to do.” Mr. Pollock justly objects to the definition in the Indian contract act, that “an agreement not enforceable in law is said to be void,” for the reason that there are agreements that cannot be sued upon, and yet are recognized by law for other purposes, and have legal effects in other ways.” He adds: “Perhaps it would be better to say that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him.”

<sup>3</sup> That “void” when used in formal documents is construed to mean “voidable” in all cases where there is a mind to contract and a thing contracted about, see Lincoln Coll. Ca., 3 Co. Rep. 58*b*; Bryan *v.* Banks, 4 B. & Ald. 401; Malins *v.* Freeman, 4 Bing. N. C. 395; and that this is the case in construction of acts of parliament, see Davenport *v.* R., L. R. 3 Ap. Ca. 128; Governors, etc. *v.* Knotts, L. R. 4 Ap. Ca. 324, cited Pollock, 3d ed. 52.

proper use of the term, it is impossible to deny to it a secondary meaning limiting invalidity to parties. Of this we have illustrations in notes executed on Sunday. These, under statute, have been repeatedly declared to be void,<sup>1</sup> yet in the hands of *bona fide* indorsees without notice, such notes have been held to bind.<sup>2</sup> Nor can property sold and delivered in pursuance of a Sunday contract, void though it be, be recovered back.<sup>3</sup>

<sup>1</sup> *Infra*, § 382.

<sup>3</sup> *Infra*, § 383.

<sup>2</sup> *Infra*, § 386.

## CHAPTER II.

### INFANTS.

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| <p>Infancy at common law embraces twenty years, § 29.</p> <p>When last year of infancy expires, § 30.</p> <p>Contracts of infants voidable, § 31.</p> <p>Other contracting party bound, § 32.</p> <p>Only infant can set up privilege, § 33.</p> <p>Avoidance may be during minority, § 34.</p> <p>Infant may hold property and pass title, § 35.</p> <p>Doubts whether prejudicial engagements are void or voidable, § 36.</p> <p>Negotiable paper voidable, § 37.</p> <p>And so of sealed instruments, § 38.</p> <p>Contracts of agency not necessarily void, § 39.</p> <p>Nor partnerships, § 40.</p> <p>Nor suretyship, § 41.</p> <p>Nor contracts for labor, § 42.</p> <p>By statute all contracts of infants may be void, § 43.</p> <p>At common law question is one of notice, § 44.</p> <p>Infant's lease and other deeds are voidable, and may be avoided by subsequent deed, § 45.</p> <p>Disaffirmance of part is disaffirmance of whole, § 46.</p> <p>Compensation not required for what has been wasted in infancy, § 47.</p> <p>But cannot inequitably recover back, § 48.</p> <p>Other party can reclaim or rescind contract, § 48 a.</p> <p>If taking benefits, must bear burden, § 49.</p> | <p>Distinction between <i>executory</i> and <i>executed</i> contracts, § 50.</p> <p>Infant's disaffirmance of <i>executory</i> contract relieves other party, though it may subject him to a <i>quantum meruit</i>, § 51.</p> <p>Infant cannot be made liable on contract declared in tort, § 52.</p> <p>Otherwise as to actions not based on contract, § 53.</p> <p>Infant compellable in equity to restore things fraudulently obtained, § 54.</p> <p>Privies may disaffirm contract, § 55.</p> <p>For ratification full age is necessary, § 56.</p> <p>Knowledge of law is not necessary, § 57.</p> <p>Ratification to be inferred from facts: continued enjoyment of profits, § 58.</p> <p>So of continuance in possession, § 59.</p> <p>Silence by vendor may amount to estoppel, § 60.</p> <p>Vendor's second deed may disaffirm first, § 61.</p> <p>Conditional ratification may be supplied with, § 62.</p> <p><i>Executory</i> contract, when resisted, must be shown to have been ratified, § 63.</p> <p>Infant liable for necessities, § 64.</p> <p>But only for value received, and not on account stated or note, § 65.</p> <p>Rules as to negotiable paper, § 66.</p> <p>Articles of trade not necessities, § 67.</p> <p>Otherwise as to educational or other services, § 68.</p> <p>Necessaries conditioned on station, § 69.</p> |
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Infant must be without home support, § 70.	Money lent not necessities, § 72.
Services rendered in preserving in- fant's property not necessities, § 71.	Contracts of marriage, § 73.
	Infant may be estopped, § 74.

§ 29. By the English common law, a person under twenty-one years of age is incapable of binding himself absolutely and irrevocably by contract. This limitation is not based on mental incapacity. There are some infants under twenty-one far more capable of making intelligent and beneficial contracts than are many persons over twenty-one, just as there are many married women who are more capable of business than many unmarried women. The reason for the limitation is the importance of protecting children from improvident engagements. In order to enable this to be done effectively, some arbitrary limit must be assigned and held to inexorably. Under the English common law this limit is the close of the twentieth year.<sup>1</sup>

Infancy at common law embraces twenty years.

§ 30. So far as concerns testamentary capacity, a person is of age on the day before that which is the twenty-first anniversary of his birth.<sup>2</sup> "The same rule," says Mr. Metcalf,<sup>3</sup> "would doubtless be applied against defendant, who should attempt to avoid, on the ground of infancy, a contract made by him on the day before the twenty-first anniversary of his birth."<sup>4</sup> And the right to exercise the electoral franchise begins the day before majority.<sup>5</sup>

When the last year of infancy expires.

§ 31. Although there is much ambiguity in the language of the old books in this respect, it is now settled that the contracts of an infant, when not made null by statute, are not void, but voidable in his favor. (1)

Contracts of infants voidable.

<sup>1</sup> Co. Lit. 171 *b*; Pollock, 3d Eng. ed. 50 *et seq.* In England, by the Infant's Relief Act of 1874, "loans of money to infants, contracts for the sale to them of goods other than necessities, and accounts stated with them, are absolutely void; and no action can be brought on the ratification of any contract made during infancy."

Ewell's Leading Cases, 1-3; Metcalf on Contracts, 38; Tyler on Inf. 2d. ed. § 2.

<sup>3</sup> Metcalf on Contracts, 38.

<sup>4</sup> To this, see *Godson v. Sanctuary*, 4 B. & Ad. 264; *Wells v. Wells*, 6 Ind. 447; *Hamlin v. Stevenson*, 4 Dana, 597.

<sup>5</sup> *State v. Clarke*, 3 Harring. 557; See 20 Am. Jur. 252.

<sup>2</sup> *Herbert v. Turball*, 1 Keb. 589;

They require no consideration when assumed by him on his majority, and they date back to their original assumption, not to his majority. (2) They are in force until repudiated, which repudiation, to be effective, must be made when they are brought to the notice of the party on his arrival at full age.<sup>1</sup> Thus an infant's transfer of a note to an indorsee for valuable consideration is voidable only;<sup>2</sup> and so of a compromise of a suit;<sup>3</sup> and of an assignment of debts,<sup>4</sup> and of an account stated;<sup>5</sup> and of contracts for labor;<sup>6</sup> and of a contract for the charter of a vessel;<sup>7</sup> and of a trading contract for the purchase of goods.<sup>8</sup>

§ 32. From this it follows that an infant can maintain an action at law against the other contracting party; nor can the latter set up want of mutuality.<sup>9</sup> Nor does the fact that the indorser

Other contracting party bound on such contract.

<sup>1</sup> *Supra*, § 28; *infra*, § 56; *Gibbs v. Merrill*, 3 Taunt. 309; *Hunt v. Massey*, 5 B. & Ad. 902; *Tucker v. Moreland*, 10 Pet. 71; *Irvine v. Irvine*, 9 Wall. 619; *State v. Plaisted*, 43 N. H. 413; *Whitcomb v. Joslyn*, 51 Vt. 79; *Worcester v. Eaton*, 13 Mass. 371; *Kendall v. Lawrence*, 22 Pick. 540; *Boyden v. Boyden*, 9 Met. 521; *Kline v. Beebe*, 6 Conn. 594; *Conroe v. Bird-sall*, 1 Johns. Cas. 127; *Roof v. Stafford*, 7 Cow. 179; *Bool v. Mix*, 17 Wend. 119; *Gillet v. Stanley*, 1 Hill (N. Y.) 121; *Law v. Long*, 41 Ind. 595; *Wheaton v. East*, 5 Yerg. 41; *Slaughter v. Cunningham*, 24 Ala. 260; *Schneider v. Staihr*, 20 Mo. 271; *Stuart v. Baker*, 14 Tex. 417. See discussion in 1 Am. Lead. Cas. 4th ed. 242 *et seq.*; *Benj. on Sales*, 3d. Am. ed. 22. As to distinction between "void" and "voidable," see *supra*, § 28; *infra*, §§ 55, 114, 117, 154, 283—see, also, *Tyler on Inf.* 2d ed. 51-2.

<sup>2</sup> *Nightingale v. Withington*, 15 Mass. 272. See fully *infra*, § 37.

<sup>3</sup> *Ware v. Cartledge*, 24 Ala. 622.

<sup>4</sup> *McCarty v. Murray*, 3 Gray, 578; *Kennedy v. Doyle*, 10 Allen, 161.

<sup>5</sup> *Williams v. Moor*, 11 M. & W. 256.

<sup>6</sup> *Judkins v. Walker*, 17 Mo. 38; *Vent v. Osgood*, 19 Pick. 572; *Clark v. Goddard*, 39 Ala. 164; *Lowe v. Sinklear*, 27 Mo. 308. But a contract "which compels him (the infant) to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant;" *R. v. Lord*, 12 Q. B. 757.

<sup>7</sup> *Walker v. Ellis*, 12 Ill. 425.

<sup>8</sup> *Warwick v. Bruce*, 2 M. & S. 205; *Bruce v. Warwick*, 6 Taunt. 118. In *Thornton v. Illingworth*, 2 B. & C. 824, as is noticed by Mr. Benjamin (*Sales*, p. 23), all that was decided was, that such a contract could not be ratified *after action brought*. For the position that a bond with penalty executed by an infant is void, has been cited *Baylis v. Dineley*, 3 M. & S. 477; but in this case, as is noticed by Mr. Pollock, "nothing more is decided than that, being under seal, it cannot be ratified save by an act of at least equal solemnity with the original instrument."

<sup>9</sup> *Supra*, § 2; *infra*, § 523; *Bruce v.*

was an infant preclude a recovery by the indorsee against the maker of negotiable paper.<sup>1</sup> A court of chancery, however, on the ground that it cannot put conditions in such cases upon the plaintiff, will not sustain a suit for specific performance brought by an infant.<sup>2</sup> And a contract which an infant is absolutely precluded from making binds neither party.<sup>3</sup>—If it be objected that there is no consideration for the promise to the infant, the answer is that the infant's promise is not only susceptible of ratification, but binds when he comes of age should he waive the plea of infancy when sued.<sup>4</sup>

§ 33. No person but the infant, or his personal representatives, is entitled to set up his infancy.<sup>5</sup> It is a privilege, however, on which he is entitled to fall back in connection with contracts concerning personal,<sup>6</sup> as well as real estate.<sup>7</sup> And though the infant's heirs,<sup>8</sup> and administrators,<sup>9</sup> can thus take advantage of his incapacity, this is not the case with his assignee.<sup>10</sup> And it is not enough for the infant, when sued after majority, on a debt incurred by him in infancy, simply to plead infancy. He must aver that he disaffirmed the contract within a reasonable time after coming of age.<sup>11</sup>

§ 34. As a rule, voidable contracts may be avoided during infancy, or within a reasonable time after coming of age.<sup>12</sup>

Warwick, 6 Taunt. 118; Thompson v. Hamilton, 12 Pick. 425; Boyden v. Boyden, 9 Met. 519; McGinn v. Shaef-fer, 7 Watts, 412.

<sup>1</sup> Grey v. Cooper, 3 Doug. 68; Jones v. Darch, 4 Price, 300; Nightingale v. Withington, 15 Mass. 273; Dulty v. Brownfield, 1 Barr, 497.

<sup>2</sup> Flight v. Bolland, 4 Russ. 298.

<sup>3</sup> Warwick v. Bruce, 2 M. & S. 205.

<sup>4</sup> *Infra*, § 523.

<sup>5</sup> U. S. v. Bainbridge, 1 Mason, 71; Hartness v. Thompson, 5 Johns. 160; Voorhees v. Wait, 3 Green (N. J.), 343; Gullett v. Lumberton, 1 Eng. Ark. 109.

<sup>6</sup> Skinner v. Maxwell, 66 N. C. 45.

<sup>7</sup> Irvine v. Irvine, 9 Wal. 67; Spencer v. Carr, 45 N. Y. 406.

<sup>8</sup> Nelson v. Eaton, 1 Redfield, 498; Austin v. Female Sem., 8 Met. 196; *infra*, § 55.

<sup>9</sup> Martin v. Mayo, 10 Mass. 137; Parsons v. Hill, 8 Mo. 135; *infra*, § 55.

<sup>10</sup> Hoyle v. Stowe, 2 Dev. & B. 323; that an indorsee cannot set up an indorser's infancy, see *supra*, § 32; *infra*, §§ 35, 37.

<sup>11</sup> Dublin, etc. v. R. R., 1 Black, 8 Exch. 181.

<sup>12</sup> Pollock on Cont. p. 42, citing Newry, etc. R. R. v. Coome, 3 Ex. 565; North Western R. R. v. Michael, 5 Ex. 114; Derocher v. Mills, 58 Mo. 217; Vent v. Osgood, 19 Pick. 572; Gaffney v. Hayden, 110 Mass. 137; Whitmarsh v. Hall, 3 Denio, 375; Meredith v. Crawford, 34 Md. 399; Ray



Whether an avoidance during minority is final, is doubtful. On the ground that an infant's contract, unless for necessities, does not absolutely bind, it would seem that he is not absolutely bound by his rescission of a contract, but that such rescission is open to repudiation by him when at full age.<sup>1</sup> It has, however, been otherwise ruled in Massachusetts;<sup>2</sup> and there may be cases (*e. g.*, subscriptions by infant shareholders) in which, it is argued by Mr. Pollock, the nature of the case is such as to make a rescission by such infant necessarily final.<sup>3</sup> And sales of land cannot ordinarily be avoided during minority.<sup>4</sup>

Avoidance may be during minority.

§ 35. There can be no question that an infant may be the recipient of property, unless of a character which the policy of the law debars him from holding.<sup>5</sup> He may also pass title. This is the case with regard to negotiable paper;<sup>6</sup> and it has been held that a transfer over by an infant transferee of stock is valid.<sup>7</sup> A gift to an infant, also, may be supported, if accompanied by delivery of the chattel.<sup>8</sup>

Infant may hold property and pass title.

§ 36. It has, however, been doubted whether engagements by an infant are not absolutely void when prejudicial to his interests.<sup>9</sup> And there may be cases where the policy of the law requires that such contracts should be absolutely void, as when a minor executes a release to a guardian;<sup>10</sup> or attempts to

Doubts whether prejudicial engagements are void or voidable.

*c. Haines*, 52 Ill. 485; *Van Pelt v. Corwine*, 6 Ind. 363; *Lowe v. Sinklear*, 27 Mo. 308. See *Towle v. Dresser*, 73 Me. —.

<sup>1</sup> *North Western R. R. v. McMichael*, 5 Ex. 114; *Dunton v. Brown*, 31 Mich. 182.

<sup>2</sup> *Edgerton v. Wolf*, 6 Gray, 453.

<sup>3</sup> *Pollock on Cont.* Wald's ed. 42.

<sup>4</sup> *Stafford v. Roof*, 9 Cow. 626; 1 Am. L. C. 317; *Shipman v. Horton*, 17 Conn. 481. *Infra*, § 45.

<sup>5</sup> *Infra*, § 45; *Knotts v. Stearns*, 91 U. S. 638; *Taylor v. Bank*, 97 Mass. 345; *Roberts' App.*, 85 Penn. St. 84; *Fanning v. Russell*, 94 Ill. 386; see *Jones v. Lock*, L. R. 1 Ch. App. 25; as to paral-

lel case of mental incompetency see *infra*, § 107 *a.*

<sup>6</sup> *Infra*, § 37, *supra*, § 32.

<sup>7</sup> *Gooch's case*, L. R. 8 Ch. 266.

<sup>8</sup> *Hunter v. Westbrook*, 2 C. & P. 578; *Grangiac v. Arden*, 10 Johns. 293; *Pierson v. Heisey*, 19 Iowa, 114; *Snow v. Copley*, 3 La. An. 610; see *Smith v. Spear*, N. J. Ct. App. 1881, 14 Cent. L. J. 16, and valuable note by Mr. Stewart.

<sup>9</sup> *Baylis v. Dineley*, 3 M. & S. 477; *Keane v. Boycott*, 2 H. Bl. 515; see *Tyler on Inf.* 2d ed. § 10.

<sup>10</sup> *Fridge v. State*, 3 Gill & J. 115. See *infra*, § 159.

bind himself to future action by bonds with penalties.<sup>1</sup> These transactions, however, are treated as nullities, not because the party entering into them is an infant, but because, in the first case, the law will not allow a guardian or other trustee to use his trust in order to obtain an advantage from his ward, and, in the second case, it will not regard a ratification by a party on arriving at full age as operating to give effect to acts to be performed long after this period. As the law, also, discountsenances speculation by a minor on interests likely to come to him by the death of relatives, his release or hypothecation of his interest in a succession will be treated as void.<sup>2</sup> And a contract in which an infant's generosity and ignorance have been imposed upon to his detriment, will in like manner be regarded as so far against the policy of the law as not to be susceptible of renewal by a naked promise on his bare arrival at majority.<sup>3</sup> But the mere fact that an agreement is prejudicial to an infant does not make it necessarily void. Otherwise the question would depend upon an uncertain test (*i. e.*, probability of detriment), as to which there could be no uniform rule.<sup>4</sup> And the better view is, that, with the exception<sup>5</sup> that an infant cannot execute a bond with penalties or a power

<sup>1</sup> *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dineley*, 3 M. & S. 477.

<sup>2</sup> *Cronise v. Clark*, 4 Md. Ch. 403; *Langford v. Frey*, 8 Hump. 443.

<sup>3</sup> *Cronise v. Clark*, 4 Md. Ch. 403; see *Baylis v. Dineley*, 3 M. & S. 477; *Latt v. Booth*, 3 C. & K. 292; *Lawson v. Lovejoy*, 8 Greenl. 405; *Langford v. Frey*, 8 Hump. 443.

<sup>4</sup> Mr. Pollock (Contracts, Am. ed. 1881, p. 35) says: "When the agreement of an infant is such that it cannot be for his benefit, it is said to be absolutely void at common law; but this distinction is exceedingly doubtful, if not altogether exploded by modern authorities." That "void" is used by judges and text writers, and even in legislation, as convertible with "voidable," see Pollock on Cont. Am. ed. 1881, p. 36, citing *State v. Richmond*, 6 Fost. 232; *Allis v. Billings*, 6

Met. 415; *Pearsoll v. Chapin*, 44 Penn. St. 9. Mr. Benjamin, Sales, 2d Am. ed. 29, comes to the same conclusion, after a careful survey of the cases. To the same effect may be cited the learned authors of 1 Am. Lead. Cas. 300, and Sir W. Anson, Anson on Contracts, 98-9. On the other hand, the old division of void and voidable is adopted in Story on Contracts, § 101, in Hilliard on Contracts, ii. 129, and in *Robinson v. Weeks*, 56 Me. 102. That "void" is used by judges in the sense of voidable is shown in *Thornton v. Illingworth*, 2 B. & C. 824; *Ayres v. Hewitt*, 19 Me. 281; *Conroe v. Birdsall*, 1 Johns. Cas. 127; *Curtin v. Patton*, 11 S. & R. 311, cited by Mr. Parsons, Contracts, i. 329; and see further, *supra*, § 28.

<sup>5</sup> *Infra*, § 39.

of attorney to bind him permanently, no contracts of an infant are void merely for the reason of infancy. They may be void, if made so for other reasons—*e. g.*, when, as we have just seen, they are brought about by undue influence—but unless this be the case, they are merely voidable.<sup>1</sup> Whenever the engagement, such is the test generally given, is not merely detrimental to the infant's interests, but is so far without a fair mutuality of consideration that fraud is to be inferred, then the courts will declare it to be void, and incapable of resuscitation by ratification.<sup>2</sup> On the other hand, it has been broadly said that an infant is bound by all contracts to his advantage.<sup>3</sup> But this leaves out of consideration the fact that the law imposing disabilities on infants is designed not merely for the protection of particular infants, but for the establishing of a period of minority during which business responsibility is in abeyance. The welfare of the community, so it may be well argued, requires that up to a particular period of life children should be sheltered from the temptation to incur business risks on their own account. This shelter could not be maintained if infants were held liable on

<sup>1</sup> *Hyer v. Hyatt*, 3 Cr. C. C. 276; *Hardy v. Waters*, 38 Me. 450; *Abell v. Warren*, 4 Vt. 149; *Reed v. Batchelder*, 1 Met. 559; *Kennedy v. Doyle*, 10 Allen, 161; *Mustard v. Wohlford*, 15 Grat. 329; *Harner v. Dipple*, 31 Oh. St. 72; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148; *Weaver v. Jones*, 24 Ala. 420; *Guthrie v. Morris*, 22 Ark. 411; *Cummings v. Powell*, 8 Tex. 90.

<sup>2</sup> In this country, as well as in England, the rule has been sometimes pushed further. In *Tucker v. Moreland*, 10 Pet. 58, *Story, J.* said: "The instrument, however solemn, is void, if upon its face it be apparent that it is to the prejudice of the infant." This is affirmed in *Fetrow v. Wiseman*, 40 Ind. 148 (*Ewell's Lead. Cas.* 21), citing, among other cases, *Hunt v. Massey*, 5 B. & Ad. 902; *Wil-*

*iams v. Moor*, 11 M. & W. 256; *Aldrich v. Grimes*, 10 N. H. 194; *Reed v. Batchelder*, 1 Met. 559; *Goodsell v. Myers*, 3 Wend. 479; *Cheshire v. Barrett*, 4 McC. 241; *Little v. Duncan*, 9 Rich. 55. The following cases tend in the same direction: *Lawson v. Lovejoy*, 8 Greenl. 405; *Robinson v. Weeks*, 56 Me. 106; *Oliver v. Houdlet*, 13 Mass. 237; *Klein v. Beebe*, 6 Conn. 503; *Fridge v. State*, 3 Gill & J. 115; *Levering v. Heighe*, 2 Md. Ch. 83; 3 Md. Ch. 368; *Monumental Building Assoc. v. Herman*, 33 Md. 132; *Langford v. Frey*, 8 Humph. 446; *Wheaton v. East*, 5 Yerg. 41; *Chandler v. McKinney*, 6 Mich. 217; *Strain v. Wright*, 7 Ga. 568. But in all these cases there existed unfairness and imposition in the agreement.

<sup>3</sup> *Cooper v. Simmons*, 7 H. & N. 721, *Wilde, B.*

advantageous contracts. So far from an infant in such case being secluded from business, he would have an additional motive to business risks; the motive that while his gains would be his, he would not be responsible for his losses.

§ 37. There is no reason, on principle, why, if an infant's promise to pay by word of mouth is voidable, it should become void when put in the shape of negotiable paper. And the present tendency is to hold that an infant's bill or note, when made for a purpose promotive of his business interest, is voidable only.<sup>1</sup> The same rule applies to endorsements on negotiable paper<sup>2</sup>; and to non-negotiable paper.<sup>3</sup> In any view, parties liable on negotiable paper cannot defend on the ground that an intermediate endorser was an infant.<sup>4</sup>

§ 38. The fact that an instrument executed by an infant is under seal does not make it void. In cases in which an infant can bind himself, his liability is not defeated by the fact that the instrument by which he expresses it is sealed.<sup>5</sup> The distinction, in fact, between sealed and unsealed contracts is, as we will hereafter see,<sup>6</sup> purely

Negotiable  
paper  
voidable.

And so of  
sealed in-  
struments.

<sup>1</sup> *Hunt v. Massey*, 5 B. & Ad. 902; *Boody v. McKenney*, 23 Me. 523; *Wright v. Steele*, 2 N. H. 51; *Conn v. Coburn*, 7 N. H. 368; *Earle v. Reed*, 10 Met. 389; *Goodsell v. Myers*, 3 Wend. 479; *Everson v. Carpenter*, 17 Wend. 419; *Hesser v. Steiner*, 5 W. & S. 476; *Cheshire v. Barrett*, 4 McCord, 241; *Bobo v. Hansell*, 2 Bailey, 114; *Strain v. Wright*, 7 Ga. 568; *Fant v. Cathcart*, 8 Ala. 725; *Buzzell v. Bennett*, 2 Cal. 101. To same effect, see *Byles on Bills*, 10th ed. 59; *Pollock on Cont. Am.* ed. 40; *Young v. Bell*, 1 Cr. C. C. 342. And as to notes given for necessities, see *infra*, § 66.

<sup>2</sup> *Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272; *Frazier v. Massey*, 14 Ind. 382; *Briggs v. McCabe*, 27 Ind. 327.

<sup>3</sup> *Story on Notes*, § 78; see *infra*, § 66.

<sup>4</sup> *Jones v. Darch*, 4 Price, 300; *Dulty v. Brownfield*, 1 Barr, 497. *Supra*, §§ 32, 33, 35.

<sup>5</sup> *Irvine v. Irvine*, 9 Wal. 617; *Kendall v. Lawrence*, 22 Pick. 540; *Spencer v. Carr*, 45 N. Y. 406; *Mustard v. Wohlford*, 15 Grat. 329; *Chapman v. Chapman*, 13 Ind. 396; *infra*, § 45 *et seq.*; *Skinner v. Maxwell*, 66 N. C. 45; *Parsons v. Hill*, 8 Mo. 135; *Weaver v. Jones*, 24 Ala. 420; *Harrod v. Myers*, 21 Ark. 592. In *Baylis v. Dineley*, 3 M. & S. 477, as is stated by Mr. Pollock (3d ed. 53), "Nothing more is decided than that it (a bond) being under seal, it cannot be ratified save by an act of at least equal solemnity with the original instrument." See *Swafford v. Ferguson*, 3 Lea (Tenn.) 292.

<sup>6</sup> *Infra*, § 671 *et seq.*

artificial, and not deserving, so far as concerns capacity to execute contracts, any further respect.

§ 39. It used to be said that an infant cannot execute a power of attorney under seal.<sup>1</sup> Where, however, the execution of such a power is important for the preservation of an infant's estates, and is not designed to establish a permanent continuous agency, there is no reason why it should be placed in this category; and *à fortiori* must we hold that an infant's appointment of an agent, for a special purpose, when a matter of convenience in the management of the infant's affairs, is voidable, not void.<sup>2</sup> On the other hand, an appointment of a permanent general agent is void, since it would destroy *in toto* the protection of minority established by the policy of the law.<sup>3</sup>

Contracts of agency not necessarily void.

§ 40. The better opinion is that an infant's contract of partnership is only voidable; and hence, if the partnership be continued by him without disaffirmance, when he arrives at full age, it binds him both as to his partners,<sup>4</sup> and as to third parties, so far as concerns debts thus impliedly ratified by him.<sup>5</sup> And to repudiate a partnership entered into during minority, prompt action on arriving at full age is necessary, as otherwise the partnership may be affirmed and ratified.<sup>6</sup> The same rule applies to the liability of an infant shareholder. "On the whole," says Mr. Pollock, "it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares

Nor partnerships.

<sup>1</sup> Saunders v. Marr, 1 H. Bl. 75.

<sup>2</sup> Hardy v. Waters, 38 Me. 450; Towle v. Dresser, 73 Me. —; Whitney v. Dutch, 14 Mass. 457; Keegan v. Cox, 116 Mass. 289; Lawrence v. McArter, 10 Ohio, 37; Pyle v. Cravens, 4 Litt. (Ky.) 17.

<sup>3</sup> See Elwell's Leading Cases, p. 45. That an appointment by an infant of an attorney in fact is void, see Story, Agency, § 463; note to Tucker v. Moreland, 1 Am. Lead. Cas. 4th ed. 244; Thomas v. Roberts, 16 M. & W. 778;

Waples v. Hastings, 3 Harring. 403; Pickler v. State, 18 Ind. 266. That a warrant of attorney by an infant to confess judgment is void, see Saunderson v. Marr, 1 H. Bl. 75; Oliver v. Woodroffe, 4 M. & W. 650; Carnahan v. Alderslice, 4 Harring. 99.

<sup>4</sup> Moley v. Brine, 120 Mass. 324.

<sup>5</sup> Pollock on Cont. 3d Eng. ed. 55; Lindley on Partnership, i. 82-84; Goode v. Harrison, 5 B. & Ald. 147; Miller v. Sims, 2 Hill, S. C. 479.

<sup>6</sup> Goode v. Harrison, *ut supra*.

are not void, but only voidable.”<sup>1</sup> And even under the English statute, providing that all contracts made during infancy shall be void, it has been held that an infant partner who does not avoid a partnership at full age is, as between himself and his partners, bound by the terms of the partnership without any formal ratification; and “a court of equity,” adds Mr. Pollock, “taking the partnership accounts, would, it is apprehended, apply the same rule to the time of his minority as to the time after his full age.”<sup>2</sup>

§ 41. The mere fact that a contract is for suretyship does not necessarily avoid it.<sup>3</sup> Hence an infant’s recognition may be only voidable.<sup>4</sup> But ordinarily a contract of suretyship by an infant from which he can derive no substantial benefit will be held invalid.<sup>5</sup>

§ 42. An infant’s contract of labor may in like manner be affirmed and continued when he is of full age.<sup>6</sup> He may, however, avoid the contract and recover the value of his services on a count for work and labor done, making allowance for any legitimate set-offs.<sup>7</sup> If a

<sup>1</sup> Pollock on Cont. 3d Eng. ed. 56, citing Lumsden’s case, L. R. 4 Ch. 31; Gooch’s case, L. R. 8 Ch. 266; see Leeds R. R. v. Fearnley, 4 Exch. 26; Northwest R. R. v. McMichael, 5 Exch. 123; Birkenhead R. R. v. Pilcher, 5 Exch. 121. *Infra*, § 49.

<sup>2</sup> Pollock on Cont. 3d. Eng. ed. 61.

<sup>3</sup> Cockshott v. Bennett, 2 T. R. 763; Owen v. Long, 112 Mass. 403; Curtin v. Patton, 11 S. & R. 30; Hinely v. Margaritz, 3 Barr, 428; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412; see Allen v. Miner, 2 Call, 70. As holding such contracts to be void see Maples v. Wightman, 4 Conn. 376; Wheaton v. East, 5 Yerg. 41, 62.

<sup>4</sup> Patchin v. Cromach, 13 Vt. 330.

<sup>5</sup> See Lumsden’s case, L. R. 4 Ch. Ap. 31; Maples v. Wightman, 4 Conn. 376. The confusion arising from the ambiguous use of the terms “void” and “voidable” in this relation is

illustrated in Curtin v. Patton, 11 S. & R. 311. In that case, Duncan, J., usually a careful as well as exact writer, after speaking of an infant’s contract of suretyship as “absolutely void,” goes on to speak of acts by which it is “confirmed.” That an infant’s contract of suretyship may be ratified, see Brandt on Suretyship, § 3.

<sup>6</sup> Thomas v. Dike, 11 Vt. 273; Moses v. Stevens, 2 Pick. 332; Houston R. R. v. Miller, 51 Tex. 270. For analogous cases, see *infra*, § 711.

<sup>7</sup> 1 Ch. on Con. 11th Am. ed. 200; Judkins v. Walker, 17 Me. 38; Thomas v. Dike, 11 Vt. 278; Moses v. Stevens, 2 Pick. 332; Vent v. Osgood, 19 Pick. 572; Bishop v. Shepherd, 23 Pick. 492; Peters v. Lord, 18 Conn. 337; Whitmarsh v. Hall, 3 Denio, 375; Medbury v. Watrous, 7 Hill, 110; Francis v. Felmit, 4 Dev. & B. 498; Van Pelt v. Corwine, 6 Ind. 363. See, however, as holding otherwise, Weeks

contract for labor is beneficial, in the main, to the infant, it may be sustained, even though such a contract gives the master a power of dismissing or of imposing penalties upon the infant.<sup>1</sup> On the other hand, a contract binding the infant to serve at all times, but leaving the master at liberty to dismiss him at any time, will be held invalid as against the infant.<sup>2</sup> Statutory contracts of apprenticeship and enlistment bind infants when the statutory directions are pursued, though it is otherwise as to ordinary covenants of indenture, which may be disaffirmed by them on arriving at full age.<sup>3</sup> The parent, however, is bound absolutely by the covenants, if duly executed by him, the right to avoid being limited to the infant, subject to statutory restrictions.<sup>4</sup>

§ 43. The evils which resulted in England from improvident bargains by minors, and the growing conviction in that country, that the line between

By statute all contracts of infants made void.

*v. Leighton*, 5 N. H. 343; *McCoy v. Huffman*, 8 Cow. 84.

As is noticed in a learned note to the 11th Am. ed. of Chitty on Cont. i. 200, *Weeks v. Leighton*, *McCoy v. Huffman*, are *per curiam* opinions, relying on *Holmes v. Blogg*, 8 Taunt. 508, which case, however, as explained in *Corpe v. Overton*, 10 Bing. 252 (see *infra*, § 48), does not sustain the doctrine that an infant, by avoiding his contract when partly executed, forfeits the right to recover for the services rendered. See *infra*, §§ 717 *et seq.* *Weeks v. Leighton* is now overruled by *Laton v. King*, 19 N. H. 280, and *Lufkin v. Mayall*, 25 N. H. 82; and *McCoy v. Huffman* by *Medbury v. Watrous*, 7 Hill, 110.

In *Vent v. Osgood*, 19 Pick. 572, Putnam, J., put the question on the right ground: "By the avoidance the contract was annihilated, and the parties are left to their legal rights and remedies, just as if there had never been any contract at all." But the contract, if an advantageous one at the

time it was entered into, and fully considered on both sides, cannot be treated by the infant, when he arrives at age, as void, so as to enable him to recover a higher rate of compensation, even though, in consequence of the rise of wages, such compensation, had there been no contract, might have been recovered. See *Breed v. Judd*, 1 Gray, 460; and see *infra*, § 48 *a*.

<sup>1</sup> *Wood v. Fenwick*, 10 M. & W. 195; *Leslie v. Fitzpatrick*, L. R. 3 Q. B. D. 229.

<sup>2</sup> *Ibid.*; *R. v. Lord*, 12 Q. B. 759.

<sup>3</sup> *Whitley v. Loftus*, 8 Mod. 190; *McKnight v. Hogg*, 3 Brev. 44; *King v. Amesly*, 10 M. & W. 195; *Woodruff v. Logan*, 1 Engl. Ark. 276.

For enlistment statutes and the rulings under them, see Wh. Cr. Pl. and Pr. §§ 980, 983.

<sup>4</sup> Tyler on Infancy, 2d ed. § 97; *Beard v. Webb*, 2 B. & P. 96; *Day v. Everett*, 7 Mass. 145; *People v. Gates*, 57 Barb. 291; *People v. Gates*, 43 N. Y. 40.

minority and majority should be firmly fixed, led, in 1874, to the adoption of the following statute (37 & 38 Vict. c. 62):—"1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable."—"2. No action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." "In fact," says Mr. Pollock,<sup>1</sup> when commenting on this statute, "the operation of the present act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced, but are valid for all other purposes." "The proviso about new consideration," he adds, "was presumably introduced by way of abundant caution, to prevent colorable evasions of the act by the pretence of a new contract founded on a nominal or trifling new consideration. Where a substantial consideration appears on the face of the transaction, these words can hardly be supposed to impose on the court the duty of inquiring whether the apparent consideration is the whole of the real consideration." He proceeds to argue that, when an infant buys and pays for goods, the statute does not entitle him, when of full age, to recover back the moneys paid. "Such a consequence would be most unreasonable, and is not required by the policy of the statute, which is obviously to protect infants from running into debt, and to discourage tradesmen and others from giving credit to them, not to deprive them of all discretion in making purchases for ready money." "On this

<sup>1</sup> Cont. 3d. Eng. ed. 61.



more reasonable construction, it is difficult to see what result is obtained by the first section which is not equally well or better obtained by the second. At common law, the infant was not bound by any of the contracts specified in the first section, unless he chose to bind himself at full age: by the second section he cannot henceforth so bind himself. No more complete protection can be imagined, and the first section appears superfluous." In Connecticut, certain contracts by infants are made void by statute.<sup>1</sup> In other states, such contracts are void, unless there be a written ratification.<sup>2</sup>

§ 44. The statute just noticed sprang from the conviction, that in the long run less harm would be done by absolutely incapacitating infants, except so far as At common law question one of policy. concerns the purchase of necessities, than would be done by making their contracts simply voidable. With this is to be considered the growing sentiment in England, that it is better that young men under twenty-one should be completely excluded from business. To enable them to make voidable engagements, so it is argued with much force, is worse for them than would be entire incapacity, since bargains made by unprincipled parties with infants under such circumstances would have in them a gambling element which would be an excuse for extortionate conditions. It must not be forgotten, also, that at common law, the question is affected by local policy. An over-populated state, where it is not desirable to increase the number of persons in business life, for whose distinctive industries long apprenticeships are desirable, whose climate and traditions do not stimulate early development, naturally fixes majority at a more advanced period of life than a state whose soil and industries call for large additions of young, active, and adventurous laborers, and whose climate and traditions lead to the assumption of responsibility at an early age.<sup>3</sup> There are states in this country, for instance, in which a modified business capacity cannot be refused to infants without producing serious business disturbance. There are also states in which it may be

<sup>1</sup> Rogers v. Hurd, 4 Day, 57; Maples v. Wightman, 4 Conn. 376.

<sup>2</sup> See Tyler on Inf., 2d ed., § 50.

<sup>3</sup> Wh. Con. of Laws, § 113.

better, in the long run, taking the population as a whole, that persons under twenty-one should be absolutely barred from making business contracts. In some states, local policy of this class is formulated in legislation. In others, it exhibits itself in greater or less judicial relaxation of the common law rule. The matter, it should be observed, under the constitution of the United States, is within the exclusive range of state determination.—In cases of conflict of local laws, the law most favoring capacity will prevail, unless there be a positive local law to the contrary.<sup>1</sup>

§ 45. An infant's conveyance of real estate is good until avoided,<sup>2</sup> and a lease beneficial to him may absolutely bind him after he has enjoyed the profits.<sup>3</sup> Unless it be repudiated when he comes of age, his conveyance of real estate will be held good in all cases in which there was no fraud, and in which he had the opportunity to exercise an election.<sup>4</sup> That an infant's lease, without reserving rent, is not absolutely void, is held, according to Mr. Pollock, by Lord Mansfield and Lord St. Leonards,<sup>5</sup> and this is clearly the case "with a lease reserving a substantial rent, whether the best rent or not;"<sup>6</sup> nor, so it has been held, can such a lease be well avoided by the infant, on arriving at majority, leasing the same land to another person, unless there has been re-entry by the infant or some notorious act indicative of resumption of possession.<sup>7</sup> A purchase or exchange of real estate by an infant is not void, but only voidable at his option.<sup>8</sup> The fact that the real estate has been intermediately conveyed to an innocent third party, does not by itself preclude the infant from avoiding the deed. Infancy is an ascertainable fact of which

<sup>1</sup> Wh. Con. of Laws, §§ 112, 114, 259.

<sup>2</sup> *Supra*, § 35; Co. Lit. 2 b; Bac. Ab. Inf., i. 3; *Irvine v. Irvine*, 9 Wal. 617; *Spencer v. Carr*, 45 N. Y. 406; *Skinner v. Maxwell*, 66 N. C. 45.

<sup>3</sup> *Madden v. White*, 2 T. R. 159.

<sup>4</sup> *Knotts v. Stearns*, 91 U. S. 638; *Tunison v. Chamblin*, 88 Ill. 378; *Johnson v. Rockwell*, 12 Ind. 76; *Jen-*

*kins v. Jenkins*, 12 Iowa, 195; *Dixon v. Merritt*, 21 Minn. 196.

<sup>5</sup> *Pollock on Cont.*, Wald's ed. 1881, p. 38, citing *Zouch v. Parsons*, 3 Burr. 1794; *Allen v. Allen*, 2 Dr. & W. 307.

<sup>6</sup> *Pollock on Cont.*, *ut supra*.

<sup>7</sup> *Slater v. Brady*, 14 Ir. C. L. 61.

<sup>8</sup> Co. Lit. 2 b, 51 b; Bac. Ab. Inf., i. 3; *Knotts v. Stearns*, 91 U. S. 638.

notice, with due diligence, may be taken, and if there be a loss, it must fall on those who have taken title carelessly.<sup>1</sup> Avoidance of a deed of real estate after the infant has come of age, may be inferred from his conveying such real estate to a third party, in all cases in which the infant has remained in possession or in which (he not remaining in possession), by the *lex rei sitæ*, a party out of possession can make a good deed of real estate without re entry.<sup>2</sup>

§ 46. Whether a disaffirmance of part of a contract is a disaffirmance of the whole, depends upon its divisibility. Ordinarily, however, when the ground of disaffirmance goes to incapacity, this pervades and discredits the entire contract.<sup>3</sup> But an infant, when rescinding a contract to work for a term of years, may recover on a *quantum meruit* for his services rendered.<sup>4</sup>

Disaffirmance of part is disaffirmance of whole.

§ 47. As we will hereafter see more fully, when a contract is executory on both sides, a rescission by the infant relieves the other party from the duty of performance.<sup>5</sup> When it is executory on the part of the adult, but executed on part of the infant, and the infant rescinds, he may recover back from the adult what he has paid.<sup>6</sup> According to Chancellor Kent,<sup>7</sup> "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration he has received."<sup>8</sup> It is true that it has been held that a female infant, plainly such, who agrees to release dower for a consideration, and

Compensation not required for what has been wasted in infancy.

<sup>1</sup> *Ibid.*; *Dunbar v. Todd*, 6 Johns. Medbury v. Watson, 7 Hill, 100; see 357; *Myers v. Saunders*, 7 Dana, 506; *Hoxie v. Lincoln*, 25 Vt. 206. *Somers v. Pumphrey*, 24 Ind. 231.

<sup>2</sup> See *infra*, § 61.

<sup>3</sup> See *infra*, §§ 114 *et seq.*

<sup>4</sup> *Gaffney v. Hayden*, 100 Mass. 137, and other cases cited *supra*, 42, *infra*, §§ 51, 711.

<sup>5</sup> *Supra*, § 2; *infra*, § 50; Tyler on Inf. 2d ed. § 35.

<sup>6</sup> *Millard v. Hewlett*, 19 Wend. 301;

<sup>7</sup> 2 Kent's Com. 240.

<sup>8</sup> See *Cresinger v. Welsh*, 15 Ohio, 156. That an infant, when disaffirming a contract, is only compelled to restore the consideration when able to do so, and that when the money is expended, he may avoid without refunding, see *Reynolds v. McCurry*, 100 Ill. 356.

afterwards disaffirms the release, cannot be compelled to pay back money received by her for the release.<sup>1</sup> But the right rule is, that where there has been a fair bargain, the benefit of which has been received by the infant, then, if he repudiates the contract when he comes of age, he should return what he has received, if retained by him.<sup>2</sup> If he has sold goods, and been paid for them, he will not, on retaining the price, be assisted in recovering them back.<sup>3</sup> But if he no longer retains the specific money or other consideration obtained by him from the adult, this having been wasted by him during infancy, then, if when he comes of age he repudiates the transaction, he cannot be compelled to return the equivalent of what he has received.<sup>4</sup> In such case payment or tender of the amount is not necessary to enable him to avoid the contract, and recover back the thing sold.<sup>5</sup> The reason of the distinction may be this: A party doing business with an infant must take the risk of the infant wasting the goods or money obtained by him, and that this may be likely to be the case, the adult ought to infer from the very fact of infancy. If the money or goods received are wasted, and the infant, on coming of age, should say, "I will not keep to this bargain, but repudiate it," then the other party must bear the loss as a consequence of his improvidence. It would be otherwise, as we will see,<sup>6</sup> as to things remaining in the infant's hands after he comes of full age. The very retention of such things is a ratification of the bargain.<sup>7</sup> Re-

<sup>1</sup> *Shaw v. Boyd*, 5 S. & R. 309; see *Walsh v. Young*, 110 Mass. 396; *Doe v. Abernethy*, 7 Blackf. 442.

<sup>2</sup> *Infra*, § 48*a*. See *Williams v. Brown*, 34 Me. 594; *Shaw v. Cuffin*, 58 Me. 254; *Riley v. Mallory*, 33 Conn. 201; *Oliver v. McClellan*, 21 Ala. 673; *Kerr v. Bell*, 44 Mo. 120.

<sup>3</sup> *Badger v. Phinney*, 15 Mass. 363.

<sup>4</sup> *Price v. Furman*, 27 Vt. 268; *Edgerton v. Wolf*, 6 Gray, 456; *Gibson v. Soper*, 6 Gray, 279; *Chandler v. Simmons*, 97 Mass. 508; *Green v. Green*, 7 Hun, 492, 69 N. Y. 553; *Dill v. Bowen*, 54 Ind. 204; *Manning v. Johnson*, 26

Ala. 446; *Hill v. Anderson*, 5 Sm. & M. 216; *Smith v. Evans*, 5 Humph. 70, and other cases cited, *Tyler on Inf.* 2d ed. § 37.

<sup>5</sup> *Dana v. Stearns*, 3 Cush. 372; *Chandler v. Simmons*, 97 Mass. 508; *Bartlett v. Drake*, 100 Mass. 174; overruling *dicta* in *Bartlett v. Coates*, 15 Gray, 445; *Badger v. Phinney*, 15 Mass. 359.

<sup>6</sup> *Infra*, § 48*a*.

<sup>7</sup> See this distinction accepted in *Bartlett v. Drake*, 100 Mass. 174; *Walsh v. Young*, 110 Mass. 396; and cases *infra*, § 48.

taining and enjoying the fruits of a bargain, as we will see,<sup>1</sup> ratifies the bargain. But if the fruits of the bargain are lost, before majority, there can be no such ratification.

§ 48. Where an infant, when within a few months of his majority, entered into a business arrangement, in carrying on of which a store was leased, a proportion of whose rent was paid by the infant, he receiving the profits, it was held in England that he could not recover back, at his majority, the sum paid, without putting the other parties *in statu quo*.<sup>2</sup> And an infant paying a premium to enter into partnership cannot, after enjoying the profits of the partnership, recover back the premium;<sup>3</sup> nor can an infant, when repudiating a mortgage given by him as part payment of land purchased by him, retain the land,<sup>4</sup> unless the funds received by him as a consideration are no longer in his power.<sup>5</sup> The principle thus stated is substantially that expressed by Lord Mansfield,<sup>6</sup> that "the privilege

But cannot  
inequitably  
recover  
back.

<sup>1</sup> See *infra*, § 59.

<sup>2</sup> *Holmes v. Blogs*, 8 Taunt. 508; 2 Moore, 552; see *Welch v. Welch*, 103 Mass. 562; and see *infra*, §§ 723 *et seq.* 752.

<sup>3</sup> *Taylor ex parte*, 8 D. M. G. 254.

<sup>4</sup> *Roberts v. Wiggin*, 1 N. H. 73; *Curtiss v. McDougal*, 26 Ohio St. 66. As authorities to the effect that the plaintiff, when repudiating a purchase, must restore the consideration he received before he can recover back what he paid, see *Locke v. Smith*, 41 N. H. 346; *Hubbard v. Cummings*, 1 Greenl. 13; *Carr v. Clough*, 26 N. H. 280; *Heath v. West*, 28 N. H. 104; *Farr v. Sumner*, 12 Vt. 28; *Taft v. Pike*, 14 Vt. 405; *Weed v. Beebe*, 21 Vt. 498; *Edgerton v. Wolf*, 6 Gray, 453; *Bartlett v. Cowles*, 15 Gray, 445; *Bartholomew v. Fennemore*, 17 Barb. 428; *Strain v. Wright*, 7 Ga. 568; *Williams v. Norris*, 2 Littell, 157; *Smith v. Evans*, 5 Humph. 70; *Betts v. Carroll*, 6 Mo. Ap. 518; *Hill v. Anderson*, 5 Sm. & M. 216. But this will not be required if

there was any taint of unfairness or illegality in the conduct of the opposite side. *Cope v. Overton*, 10 Bing. 252; *Price v. Furman*, 27 Vt. 268; *Gibson v. Soper*, 6 Gray, 279; *Walsh v. Young*, 110 Mass. 396; *Stoolfoos v. Jenkins*, 12 S. & R. 399; *Lenhart v. Ream*, 74 Penn. St. 59; *Urban v. Grimes*, 2 Grant Cas. 96.

That an infant can recover back the price only (when practicable) on restoring the thing purchased, see *Riley v. Mallory*, 33 Conn. 201; *Kerr v. Bell*, 44 Mo. 120. In *Chandler v. Simmons*, 97 Mass. 508, and *Bartlett v. Drake*, 100 Mass. 174, it was held that if an infant has spent the money received by him for a conveyance of real estate, he could avoid the conveyance without repaying the amount. To same effect as to personal property, see *White v. Branch*, 51 Md. 210. This distinction is more fully noticed, *supra*, § 47.

<sup>5</sup> *Walsh v. Young*, 110 Mass. 396.

<sup>6</sup> *Zouch v. Parsons*, 3 Burr. 1794.

is given as a shield and not as a sword;" and "that it never shall be turned into an offensive weapon of fraud or injustice." This maxim is adopted by Chancellor Kent.<sup>1</sup> On the other hand, money advanced by an infant for business purposes can be recovered back when the infant retained no benefit from the contract.<sup>2</sup> And money paid by an infant on an unexecuted contract can always be recovered back.<sup>3</sup>

§ 48 a. We may, therefore, hold that where an infant repudiates, on arriving at age, a contract by which he has obtained assets he has in infancy wasted, he cannot be made to pay an equivalent for such assets; while, on the other hand, if he retains the assets, but disaffirms and repudiates the contract, the other contracting party can reclaim these assets, though he can sustain no action against the infant for any deterioration they may have suffered in the infant's hands.<sup>4</sup> In case, however, the goods have

<sup>1</sup> 2 Com. 240.

<sup>2</sup> Cope v. Overton, 10 Bing. 252; 3 Moore & S. 738.

<sup>3</sup> Robinson v. Weeks, 56 Me. 102; Medbury v. Watrous, 7 Hill, 110. In Ruchizky v. De Haven, 97 Penn. St. 202, it was held that an infant's executors could recover from stock-brokers money advanced by him to them on a gambling stock speculation which they engaged in on his account. The court said that "if the parties had been *sui juris*, the contract having been fully executed, we would not interfere to help either party. But such is not the case; for, as we have said, Ruchizky was a minor, and hence was entitled to legal protection and guardianship. It is said they knew not that he was a minor; but what does that matter? He was, nevertheless, an infant, and their want of knowledge did not make him *sui juris*. . . . The defendants have endeavored to interpose for their protection the doctrine that where an infant has executed a contract, and has enjoyed the benefit of it, and after-

wards, on arriving at age, seeks to avoid it, he must first restore the consideration he received; that he cannot have the benefit on the one side without restoring the equivalent on the other. The rule may, and certainly does, apply in certain cases, but, as a general rule, it is unsound. Its application was refused in Shaw v. Boyd, 5 S. & R. 309; and as was said by Mr. Justice Bailies, in Abell v. Warren, 4 Vt. 149, 'If this be true, then the privilege of infants is not worth possessing.' But all this is foreign to the case in hand, for we have here a contract condemned by public policy—a contract that is not merely voidable, but void *ab initio*. It follows that nothing can be imposed on the infant as a condition of rescission."

<sup>4</sup> Boody v. McKenney, 23 Me. 525; Fitts v. Hall, 9 N. H. 441; Price v. Furman, 27 Vt. 268; Whitcomb v. Joslyn, 51 Vt. 79; Badger v. Phinney, 15 Mass. 359; Kitchen v. Lee, 11 Paige, 107; Henry v. Root, 33 N. Y. 526; Strain v. Wright, 7 Ga. 568; Jefford v.

been wasted or parted with by the infant, no action can be maintained against him for not redelivering them to the vendor.<sup>1</sup>

§ 49. An infant who takes property on which are certain burdens, cannot enjoy the property relieved from the burden. An infant lessee, for instance, who holds until he is of full age, becomes then liable for back arrears, though accumulated during his minority.<sup>2</sup>

If taking benefit must bear burden.

And an infant stockholder in a railway company who holds his shares, enjoying the benefits attached to them, is bound, if he does not throw them up when of full age, to meet any obligations growing out of the property so held.<sup>3</sup>

§ 50. As has been already incidentally noticed,<sup>4</sup> an executory contract, *i. e.*, one which requires the action of a court to enforce if performance be refused, cannot, unless for necessities as hereafter noticed, be enforced against a party who entered into it during infancy, supposing that there was no ratification at majority.<sup>5</sup> An *executed* contract remains in force until disaffirmed; an *executory* contract requires affirmatory action for its establishment.<sup>6</sup> The *executed* contract requires the action of a court to disturb it; the *executory* contract the action of a court to enforce it. The principle pervading both lines of cases is, that a bargain made by an infant, he should have the option of disaffirming when arriving at full age. The distinction between the two is, that, in reference to the executed

Distinction between executory and executed contracts.

Ringgold, 6 Ala. 544; Manning *v.* Johnson, 26 Ala. 446.

<sup>1</sup> Benj. on Sales, 3d Am. ed. § 22; Boody *v.* McKenney, 23 Me. 525; Price *v.* Furman, 27 Vt. 268; Whitcomb *v.* Joslyn, 51 Vt. 79; *supra*, § 47.

<sup>2</sup> Kettle *v.* Eliot, Rolle Ab. i. 731, K.; 2 Bulst. 69; Cro. Jac. 320. See Evelyn *v.* Chichester, 3 Burr. 1717.

<sup>3</sup> Newry & Ennisk. R. R. *v.* Coombs, 3 Ex. 565; Northwestern R. R. *v.* McMichael, 5 Ex. 114. Of these cases Mr. Pollock says: "It may perhaps be doubted whether the reason on which these authorities are grounded would

apply to the case of shares in a company not having any permanent property; but it seems tolerably plain that if necessary, the general principles of the law of partnership would, and that the same results would follow, except it may be as to suing the shareholder while still a minor." See *supra*, § 40.

<sup>4</sup> *Supra*, § 47.

<sup>5</sup> Hunt *v.* Peake, 5 Cow. 475; Wilt *v.* Welsh, 6 Watts, 9.

<sup>6</sup> Williams *v.* Moor, 11 M. & W. 256; Conklin *v.* Ogborn, 7 Ind. 553; Blankenship *v.* Stout, 25 Ill. 132.

contract, he then appears as the actor in the suit, bearing the burden of proof, if he wish to set aside the arrangement; while, in reference to the executory contract, he appears as defendant, the burden being on the party seeking to make good against him the contract.—When a contract is executed by an infant, and a title vests in him, this cannot afterwards be disturbed, nor can he, while holding the property, recover back what he paid for it.<sup>1</sup> And “if an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot, on attaining his majority, recover the money back.”<sup>2</sup>

Infant's disaffirmance of executory contract relieves other party, though it may subject him to a *quantum meruit*. § 51. When an *executory* contract is disaffirmed by an infant, the other contracting party is released from all liability. The agreement becomes a nullity, and when one party is not bound, the other party is not bound.<sup>3</sup> Where, however, an infant, on arriving at majority, repudiates a contract of labor for a term of years, he may sue his employer on a *quantum meruit* for services rendered.<sup>4</sup>

Infant cannot be made liable on contract by declaring in tort. § 52. Where an infant cannot be made liable on a contract by a suit on the contract, he cannot be made liable by suing him in tort.<sup>5</sup> Thus, an infant innkeeper is not liable for losses sustained by his guests.<sup>6</sup> Even an action does not lie against him for deceit in af-

<sup>1</sup> *Supra*, § 35.

<sup>2</sup> Turner, L. J., in Taylor *ex parte*, 8 DeG. M. & G. 254; Benj. on Sales, 3d Am. ed. § 24, citing Robinson v. Weeks, 56 Me. 102; Breed v. Judd, 1 Gray, 456; Harney v. Owen, 4 Blackf. 337; Bailey v. Barnberger, 11 B. Mon. 113; Smith v. Evans, 5 Humph. 70; Hill v. Anderson, 5 Sm. & M. 216; Cummings v. Powell, 8 Tex. 801. See, however, Riley v. Mallory, 33 Conn. 201, where it was held that an infant, on returning a thing purchased, could recover what he paid for it.

<sup>3</sup> See *supra*, §§ 2, 47.

<sup>4</sup> *Supra*, § 42; Sloan v. Hayden, 110 Mass. 141; Whitmarsh v. Hall, 3 Denio,

377; Ray v. Haines, 52 Ill. 485; for analogous cases see *infra*, §§ 711 *et seq.*

<sup>5</sup> Jennings v. Randall, 8 T. R. 335; Price v. Hewett, 8 Ex. 146; Burley v. Russell, 10 N. H. 184, Prescott v. Norris, 32 N. H. 101; West v. Moore, 14 Vt. 447; Tilson v. Spear, 38 Vt. 311; Merriam v. Cunningham, 11 Cush. 40; Conroe v. Birdsell, 1 Johns. Cas. 127; People v. Kendall, 25 Wend. 399; Schenck v. Strong, 1 South. 87; Stoolfoos v. Jenkins, 12 S. & R. 400; Wilt v. Welsh, 6 Watts, 9; Penrose v. Curran, 3 Rawle, 351.

<sup>6</sup> Crosse v. Androes, 1 Roll. Ab. 2 D. pl. 3.



firming himself of full age, and thereby defrauding the plaintiff.<sup>1</sup> Nor does an action lie against him for deceit or false representation in sale of goods.<sup>2</sup> Nor does the fact that the infant has made such representations estop him from afterwards setting up infancy;<sup>3</sup> nor, in any action on the contract, does the fraudulent misrepresentation afford any answer upon equitable grounds to the plea of infancy.<sup>4</sup>

§ 53. Trover, not being based on contract, is not barred by a plea of infancy.<sup>5</sup> The same rule applies to replevin.<sup>6</sup> That an infant cannot be made liable for tort for injuries sustained by a horse hired by him, but driven beyond the limit agreed upon, is asserted in Penn-

Otherwise  
as to suits  
not based  
on contract.

<sup>1</sup> Pollock on Cont. 3d Eng. ed. 74; *Johnson v. Pie*, 1 Sid. 258; 1 Keble, 905; aff. in *Adelphia Loan Ass. v. Fairhurst*, 9 Ex. 422; *Stikeman v. Dawson*, 1 DeG. & S. 113; *Brown v. McCune*, 5 Sandf. 224; an action, however, on contract. See, *contra*, *Fitts v. Hall*, 9 N. H. 441; *Ecksteen v. Frank*, 1 Daly, 334; *Hughes v. Gallans*, 10 Phila. 818; 31 Leg. Int. 349; and criticism in *Metcalf on Contracts*, 51. In 1 Am. Lead. Cas. (4th ed.) 262, *Fitts v. Hall* is disapproved on the ground that "the representation, by itself, was not actionable, for it was not an injury, and the avoidance of the contract, which alone made it so, was the existence of a perfect legal right on the part of the infant." This was adopted in *Benj. on Sales*, 3d Am. ed. § 22, where the question is examined in detail. The question is left open in *Merriam v. Cunningham*, 11 Cush. 43. See *infra*, § 1047.

<sup>2</sup> *DeRoo v. Foster*, 12 C. B. N. S. 272; *Prescott v. Norris*, 32 N. H. 101; *Eaton v. Hill*, 50 N. H. 235; *West v. Moore*, 14 Vt. 447; *People v. Kendall*, 25 Wend. 399; *Heath v. Mahoney*, 14 N. Y. Sup. Ct. 100.

<sup>3</sup> *Burley v. Russell*, 10 N. H. 184; *Merriam v. Cunningham*, 11 Cush. 40; and cases cited *infra*, § 74.

<sup>4</sup> *Leake*, 2d ed. 546, citing *Bartlett v. Wells*, 1 B. & S. 836; *DeRoo v. Foster*, 12 C. B. N. S. 272; *Stikeman v. Dawson*, 1 D. & Sm. 90; *Burley v. Russell*, 10 N. H. 184; *Merriam v. Cunningham*, 11 Cush. 40; *Stoolfoos v. Jenkins*, 12 S. & R. 399. But see *Matthews v. Cowin*, 59 Ill. 341; *Pergin v. Sutcliffe*, 4 McCord, 389; *Kilgrove v. Jordan*, 17 Tex. 349. In *Stoolfoos v. Jenkins*, *Tilghman, C. J.*, said: "If an infant, wishing to engage in trade or commerce, should purchase goods on credit, representing himself to be of full age, this, though extremely reprehensible, would not make the contract obligatory. So, if, under a similar representation, he should borrow money, and give his bond for it, payment would not be compelled."

<sup>5</sup> *Vasse v. Smith*, 6 Cranch, 226; *Lewis v. Littlefield*, 15 Me. 233; *Wallace v. Moss*, 5 Hill (N. Y.), 391; *Campbell v. Stakes*, 2 Wend. 137; *Schenck v. Strong*, 1 South. 87; *Strain v. Wright*, 7 Ga. 568; though see in *Pennsylvania*, *Wilt v. Welsh*, 6 Watts, 9.

<sup>6</sup> *Badger v. Phinney*, 15 Mass. 364; *Boyden v. Boyden*, 9 Met. 521; *Jefford v. Ringgold*, 6 Ala. 544.

sylvania.<sup>1</sup> But the prevalent tendency is to affirm such liability.<sup>2</sup> And although an infant cannot be made liable in tort for overriding a hired horse,<sup>3</sup> yet if he hurt a horse in doing something for which it was not hired to him (*e. g.*, jumping and not riding, the horse being refused for jumping), he is liable in tort for the injury.<sup>4</sup>—The question whether an infant is chargeable in an action for fraudulently obtaining goods with intention not to pay for them, is one of much difficulty. On the one hand, it may be argued that when *capax doli* he is indictable, under such circumstances, for obtaining property by false pretences;<sup>5</sup> and if criminally indictable for the fraud, he is civilly responsible in a suit for tort.<sup>6</sup> On the other hand, it may be said that as in most cases an infant doing business does not disclose his age, to make him liable in all cases of non-disclosure would do away with the protection of infancy altogether. But this is not so. Criminal prosecutions for false pretences, and civil suits for fraud, could only be sustained in cases where there was nothing in the infant's appearance and surroundings to give notice of his infancy. The cases, therefore, in which such responsibility would attach, are comparatively rare; and the protection given to infancy, as a rule, is not likely to be diminished if a person who, in appearance, is of full age, who is *capax doli*, and who is permitted by his guardians to do business on his own account, is held responsible for tort. At the same time there is a strong current of authority to the effect, that unless there is some special damage in the way of injury by the infant's false pretence, and unless that false pretence was in the nature of a false token, calculated, under the circumstances, to deceive even the circumspect, he cannot be made liable for a false

<sup>1</sup> *Wilt v. Welsh*, 6 Watts, 9; *Penrose v. Curran*, 3 Rawle, 351.

<sup>2</sup> *Ray v. Tubbs*, 50 Vt. 688; *Horner v. Thwing*, 3 Pick. 492; *Campbell v. Stakes*, 2 Wend. 137.

<sup>3</sup> *Jennings v. Rundell*, 8 T. R. 335.

<sup>4</sup> *Burnard v. Haggis*, 14 C. B. N. S. 45; *Horner v. Thwing*, 3 Pick. 492; *Eaton v. Hill*, 50 N. H. 235; *Towne v.*

*Wiley*, 23 Vt. 355; *Campbell v. Stakes*, 2 Wend. 137.

<sup>5</sup> Wh. Cr. L. 8th ed. § 1149.

<sup>6</sup> *Fitts v. Hall*, 9 N. H. 441; *Wallace v. Morse*, 5 Hill, 391; *Hughes v. Gallans*, 10 Phila. 618; *Mathews v. Cowan*, 59 Ill. 341; see *Shaw v. Coffin*, 58 Mo. 254.

affirmation of age.<sup>1</sup> But for a purely non-contractual tort an infant is liable, supposing he is over fourteen years of age;<sup>2</sup> and between seven and fourteen, he is liable, on proof of malice, the burden of proof being on the plaintiff.<sup>3</sup> And even when under seven years, his estate may be liable for negligent injuries sustained through its instrumentality.<sup>4</sup>

§ 54. Even the Infants' Relief Act, which in England makes absolutely void an infant's contracts, does not preclude a party from recovering in equity from an infant property that he has obtained by a false representation of his age;<sup>5</sup> nor, in equity, can an infant who has had money paid him on the faith of his statement that he is of full age, recover, on his majority, such money a second time from the party from whom it was obtained.<sup>6</sup> And it has been further held, that a minor who holds himself out as of full age, and as such becomes a bankrupt trader, cannot subsequently contest the bankrupt decree on the ground of his infancy.<sup>7</sup>

Compellable in equity to restore things fraudulently obtained.

§ 55. In case of the death of an infant before reaching majority, his representatives may disaffirm contracts made by him, subject to the conditions above stated. Thus his executors may refuse to fulfil an executory contract which he may have made;<sup>8</sup> and his heirs may by conveyance, or other method of repudiation, dis-

Privies may disaffirm contract.

<sup>1</sup> *Johnson v. Pie*, 1 Lev. 169; *Price v. Hewett*, 8 Exch. 146; *Brown v. McCune*, 5 Sandf. 224; 1 Am. Lead. Cas. 117, 118; 1 Parsons on Cont. 317.

<sup>2</sup> *Lewis v. Littlefield*, 15 Me. 233; *Prescott v. Norris*, 32 N. H. 101; *Eaton v. Hill*, 50 N. H. 235; *Loop v. Loop*, 1 Vt. 177; *Humphrey v. Douglass*, 10 Vt. 71; *Green v. Sperry*, 16 Vt. 390; *Baxter v. Bush*, 29 Vt. 465; *Walker v. Davis*, 1 Gray, 506; *Sikes v. Johnson*, 16 Mass. 389; *Brown v. Maxwell*, 6 Hill (N. Y.), 592; *Wilt v. Welsh*, 6 Watts, 9; *Hughes v. Gallans*, 31 Leg. Int. 349; *Barham v. Turbeville*, 1 Swan, 437.

<sup>3</sup> See Wh. Cr. L. 8th ed. §§ 67 *et seq.*

<sup>4</sup> *McGee v. Willing*, 31 Leg. Int. 37. That an infant is liable in cases of non-contractual tort, see further *Prescott v. Norris*, 32 N. H. 101.

<sup>5</sup> *Pollock on Contracts*, 3d Eng. ed. 75, citing *Bartlett v. Wells*, 1 B. & S. 836; *Clarke v. Cobley*, 2 Cox, 173; *Stiteman v. Dawson*, 2 DeG. & S. 901.

<sup>6</sup> *Cory v. Gertoken*, 2 Madd. 40.

<sup>7</sup> *Watson ex parte*, 16 Ves. 265; *Lynch ex parte*, L. R. 2 Ch. § 227.

<sup>8</sup> *Supra*, § 33; *Stone v. Wythipol*, Cro. Eliz. 126; see *Ruchisky v. De Haven*, cited *supra*, § 48.

affirm prior conveyances made by him.<sup>1</sup> The disaffirmance, however, must be made by heirs, if the contract relate to real estate, or by executors, if to personalty. His guardian is not his representative for this purpose.<sup>2</sup> The privilege is personal.<sup>3</sup>

§ 56. No matter how numerous may be the ratifications of a contract by an infant, and how closely these may press upon his majority, they are without effect. The party to whom the ratification is imputed must be of full age, or otherwise it will be inoperative.<sup>4</sup>

On the other hand, we must remember that an infant can avoid a contract during infancy, though it is doubtful, as we have seen, whether such avoidance is otherwise than provisional until he is of full age.<sup>5</sup> As to real estate, full age is necessary, it is said, to disaffirmance.<sup>6</sup> It must also be remembered that, as is said by high authority, "voidable means not invalid until ratified, but valid until rescinded."<sup>7</sup> Non-avoidance of a contract at full age, therefore, when the contract is brought to the party's notice, is, if intelligent and deliberate, a ratification.<sup>8</sup> Undoubtedly much confusion has arisen from the use, in this relation, of the word "ratification," as if it involved the assumption, that prior to such "ratification" the supposed "contract" was not existent. But this is a wrong meaning of the term. A contract made by an infant, supposing him to have the mental power to do business, and supposing that he and the other contracting party agree as to one and the same thing to be done, binds him unless it is disaffirmed by him when he reaches full age. When he reaches

<sup>1</sup> Whittingham's Case, 8 Co. 42 b.

<sup>2</sup> Oliver v. Houdlet, 13 Mass. 240. In Taylor v. Johnson, 46 L. T. N. S. 219, it was ruled that a gift made by an infant and perfected by delivery cannot, after his death, be set aside, in absence of proof of fraud or undue influence, by his personal representatives.

<sup>3</sup> Towle v. Dresser, 73 Me.

<sup>4</sup> Metc. on Cont. 55, and cases cited, *infra*, §§ 57 et seq.

<sup>5</sup> *Supra*, § 34.

<sup>6</sup> Shipman v. Horton, 17 Conn. 481; Stafford v. Roof, 9 Cow. 626.

<sup>7</sup> Pollock on Cont. (Wald's ed.) 42, citing Lord Colonsay, *in re Overend*, Gurney & Co., L. R. 2 H. L. 375.

<sup>8</sup> *Supra*, § 28; Forsyth v. Hastings, 25 Vt. 646. That affirmation must take place before action brought, see Thornton v. Illingworth, 2 B. & C. 824; Thing v. Libbey, 16 Me. 55; Conn v. Coburn, 7 N. H. 372; Hale v. Gerrish, 8 N. H. 374; Aldrich v. Grimes, 10 N. H. 198; Goodridge v. Ross, 6 Metc. 487.

full age, and, being conscious of the existence of the contract, deliberately declines to repudiate, it may be enforced against him, dating not from his majority, but from the period of its original inception.<sup>1</sup> The same distinction applies to the contracts of lunatics, *mutatis mutandis*.<sup>2</sup> According to Mr. Chitty: <sup>3</sup> "In the case of a *continuing* contract, which is voidable only by an infant on his coming of age, he is presumed to ratify such contract; if he do not, within a reasonable time after he has attained his full age, give notice of his disaffirmance of, or otherwise reject, such contract; unless, that is, the other party dispense with such disaffirmance."<sup>4</sup> The distinction is this: A continuing contract, unless repudiated, continues in force. On the other hand, while the same principle applies to executory contracts, a refusal to perform is a disaffirmance, and has to be overcome by proof of actual prior ratification.<sup>5</sup>

§ 57. Supposing that there be no fraud on the part of the other contracting party, it is not necessary to the validity of an affirmation, that the person making it should be aware of its legal effects. He may have as little knowledge of these effects the day after as he had the day before he comes of age. But the line drawn by the law is necessarily arbitrary; and, as soon as he becomes of age, a knowledge of the legal character of his acts is imputed to him. It is true that there have been intimations that a ratification will not be recognized by the courts

Knowledge of law is not necessary.

<sup>1</sup> *Supra*, § 28.

<sup>2</sup> *Infra*, § 114. As sustaining the text, see *Gibbs v. Morrill*, 3 Taunt. 307; *Irvine v. Irvine*, 9 Wall. 617; *Boody v. McKenny*, 23 Me. 517; *Tucker v. Moreland*, 10 Pet. 58; *Heath v. West*, 26 N. H. 101; *Boyden v. Boyden*, 9 Met. 519; *Jackson v. Carpenter*, 11 Johns. 539; *Boal v. Mix*, 17 Wend. 120; *Kitchen v. Lee*, 11 Paige, 107; *Drake v. Ramsay*, 5 Ohio, 251; *Phillips v. Green*, 3 Marsh. 7; *McGill v. Woodward*, 3 Brev. 401; *Cheshire v. Barrett*, 4 McC. 241; and cases cited *supra*, § 31.

<sup>3</sup> 1 Cont. 11th Am. ed. 216.

<sup>4</sup> To this is cited *Holmes v. Blogg*, 8 Taunt. 35. See to same effect cases cited, *supra*, § 28; *infra*, § 58.

<sup>5</sup> *Infra*, § 63; *Hoit v. Underhill*, 9 N. H. 436, 10 N. H. 220; *Thompson v. Lay*, 4 Pick. 48; *Proctor v. Sears*, 4 Allen, 95; *Kline v. Beebe*, 6 Conn. 494; *Goodsell v. Myers*, 3 Wend. 479; *Millard v. Hewlett*, 19 Wend. 301; *Alexander v. Hutcheson*, 2 Hawks, 535; and cases cited, *infra*, §§ 57 *et seq.* As to continuing considerations, see *infra*, § 515. As to continuing offers, *supra*, § 9.

unless made with a knowledge of the consequences.<sup>1</sup> If by this is meant that loose talk by a person just coming of age, or concessions induced by misstatements or suppressions of the other side, will not be regarded as ratification, the conclusion may be accepted as true. But to say that a knowledge of the legal consequences of a ratification is necessary to validate a ratification, not only interposes a condition it would be difficult to establish, and which would often be made dependent upon the testimony of the party himself long afterwards when his views may have changed, but would invalidate all ratifications, since there is no ratification all of whose legal consequences can be foreseen. Hence the better opinion is that a ratification, made by a person of sound mind, on arriving at his majority, will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law.<sup>2</sup> If, however, the ignorance of the party ratifying be in any way induced by the other side, then the ratification will not be regarded as operative.<sup>3</sup>

§ 58. A contract by an infant, not in itself unreasonable, is ratified by a continuance on his part, after he arrives at age, to intelligently enjoy its fruits.<sup>4</sup> Hence acceptance of rent, after majority, is a ratification of a lease made during minority, and even a recognition of the lessee's status as such has been held to have this effect.<sup>5</sup> This is also the rule with regard to partnership contracts;<sup>6</sup> with regard to the retention of shares

<sup>1</sup> Harmer v. Killing, 5 Esp. 103; Thing v. Libbey, 16 Me. 57; Smith v. Mayo, 9 Mass. 64; Curtin v. Patton, 11 S. & R. 311; Hinely v. Margaritz, 3 Barr, 428; Norris v. Vance, 3 Rich. (S. C.) 168; Febrow v. Wiseman, 40 Ind. 148; Turner v. Gaither, 83 N. C. 357.

<sup>2</sup> Benj. on Sales, 2d ed. § 27; Mete. on Cont. 59; Stevens v. Lynch, 12 East, 38; Morse v. Wheeler, 4 Allen, 570; Taft v. Sergeant, 18 Barb. 320. That mistake as to law does not usually avoid, see *infra*, § 198.

<sup>3</sup> See Turner v. Gaither, 83 N. C. 357; and *infra*, § 168.

<sup>4</sup> Boody v. McKenny, 23 Me. 517; Boyden v. Boyden, 9 Mete. 519; Aldrich v. Grimes, 10 N. H. 194; Delano v. Blake, 11 Wend. 85; Henry v. Root, 33 N. Y. 526; Pursley v. Hays, 17 Iowa, 311; Deason v. Boyle, 1 Dana, 45; Alexander v. Heriot, 1 Bailey Eq. 243; Cheshire v. Barrett, 4 McCord, 241.

<sup>5</sup> *Supra*, § 56; Smith v. Low, 1 Atkins, 489; Thing v. Libbey, 16 Me. 55.

<sup>6</sup> Holmes v. Blogg, 8 Taunt. 35.

of stock on which there is a burden ;<sup>1</sup> with regard to the holding and using of cattle ;<sup>2</sup> and with regard to a settlement of indebtedness acquiesced in for several years.<sup>3</sup> A conveyance in fee, after majority, reciting and providing for a mortgage of the same land made during minority, is a ratification of the mortgage.<sup>4</sup> Acquiescence for a series of years in a sale cannot be excused on the ground of forgetfulness.<sup>5</sup> But mere temporary retention of goods is not sufficient to sustain the inference of ratification ;<sup>6</sup> nor will an assumption of a debt unless specifically pointed to such debt.<sup>7</sup> Continuance by a servant in a contract of service, after he is of full age, is a ratification of the contract.<sup>8</sup>

§ 59. A continuance, after majority, in possession of land purchased during minority may ratify ;<sup>9</sup> and so may the payment of rent on a lease taken during minority,<sup>10</sup> and the carving out of inferior interests, retaining the control of the title.<sup>11</sup>

So of continuance in possession.

§ 60. A mere non-disaffirmance, after majority, of a vendee's title, under a conveyance made during minority, does not operate to affirm the conveyance, unless the period of statutory prescription is reached ;<sup>12</sup>

Silence by vendor may amount to estoppel.

<sup>1</sup> *Western R. R. v. McMichael*, 5 Ga. 114.

<sup>10</sup> *Supra*, § 58.

<sup>2</sup> *Robinson v. Hoskins*, 14 Bush, 393 ; see *Miller v. Sims*, 2 Hill, S. C. 479.

<sup>11</sup> See *Tucker v. Moreland*, 10 Pet. 58 ; *Hubbard v. Cummings*, 1 Greenl. 11 ; *Eagle Co. v. Lent*, 6 Paige, 635 ; *Williams v. Mabree*, 3 Halst. Ch. 500 ;

<sup>3</sup> *Thomasson v. Boyd*, 13 Ala. 419.

<sup>4</sup> *Story v. Johnson*, 2 Y. & C. 607 ; *Boston Bk. v. Chamberlain*, 15 Mass. 220 ; see *Williams v. Mabree*, 3 Halst. Ch. 500.

*Hoyle v. Stowe*, 2 Dev. & B. 320 ; *cf. Holmes v. Blogg*, 8 Taunt. 35.

<sup>5</sup> *Tunison v. Chamblin*, 88 Ill. 378. That part payment is not a ratification, see *infra*, § 63.

<sup>12</sup> *Tucker v. Moreland*, 10 Pet. 58 ; *Irvine v. Irvine*, 9 Wall. 617 ; *Boody v. McKenny*, 23 Me. 523 ; *Emmons v. Murray*, 16 N. H. 394 ; *Kline v. Beebe*, 6 Conn. 494 ; *Jackson v. Carpenter*, 11 Johns. 539 ; *Boal v. Mix*, 17 Wend. 120 ; *Drake v. Ramsay*, 5 Ohio, 193 ;

<sup>6</sup> *Todd v. Clapp*, 118 Mass. 495.

<sup>7</sup> *Tobey v. Wood*, 123 Mass. 88.

<sup>8</sup> *Spicer v. Earl*, 41 Mich. 291. As to repudiation of contract, see *supra*, § 51.

<sup>9</sup> *Dana v. Coombs*, 6 Greenl. 89 ; *Kline v. Beebe*, 6 Conn. 494 ; *Henry v. Root*, 33 N. Y. 526 ; *Lynde v. Budd*, 2 Paige, 191 ; see *Bigelow v. Kinney*, 3 Vt. 353.

*Cresinger v. Welsh*, 15 Ohio, 193 ; *Doe v. Abernethy*, 7 Blackf. 442 ; *Hastings v. Dollarbride*, 24 Cal. 195 ; *Prout v. Wiley*, 28 Mich. 164 ; *Norris v. Vance*, 3 Richards. S. C. 164 ; *Wallace v. Latham*, 52 Miss. 291.

though it is otherwise, if, after arriving at twenty-one, the vendor sees, without notice, the vendee put valuable improvements on the property conveyed. Such silent acquiescence on his part amounts to an estoppel, and precludes him from afterwards invalidating the sale.<sup>1</sup> And an enjoyment of the purchase-money for a long series of years, with tacit encouragement to the vendee to settle permanently, operates as a confirmation,<sup>2</sup> especially when the vendee has gone on without molestation to make improvements on the land.<sup>3</sup> The same rule applies to all contracts. But lapse of time does not preclude repudiation when there has been no estoppel or intermediate ratification by enjoyment.<sup>4</sup>

§ 61. An infant vendor's deed of real estate is disaffirmed by the execution, after his majority, of a second deed, inconsistent with the first, to a third party; nor, to effect this disaffirmance, is it necessary, that the infant should re-enter on the lands. The second deed, however, must be in express conflict with the first.<sup>5</sup> But to make the second deed effectual as against the first vendee, the grantor, in jurisdictions where this is required, must be in actual or constructive possession, and must not be estopped by laches from asserting his rights.<sup>6</sup> The question whether there must be a re-entry depends upon whether the *lex rei sitæ* sustains deeds from parties in merely constructive possession.<sup>7</sup> It would be unfair, however, to treat a second deed, made after majority, as an avoidance of a first deed, made during minority, unless the vendee under the first deed has notice of the vendor's avoiding act. If the vendor and the

<sup>1</sup> Whart. on Ev. § 1144; Bigelow on Est. 3d ed. 337 *et seq.*; Kerr on Fraud, 296; Gregory v. Mighell, 18 Ves. 328; Jones v. Phoenix Bank, 4 Seld. 235; Wallace v. Lewis, 4 Harring. 75; Wheaton v. East, 5 Yerg. 41. As to estoppels during infancy, see *infra*, § 74 *et seq.*

<sup>2</sup> Richardson v. Boright, 9 Vt. 368; Kline v. Beebe, 6 Conn. 494.

<sup>3</sup> Davis v. Dudley, 70 Me. 236; Cocks v. Simmons, 37 Miss. 183.

<sup>4</sup> Gillespie v. Bailey, 12 W. Va. 70.

<sup>5</sup> Eagle Fire Co. v. Lent, 6 Paige, 635; Cresinger v. Welsh, 15 Ohio, 156; Hoyle v. Stowe, 2 Dev. & B. 320; see Slater v. Brady, 14 Ir. C. L. 61.

<sup>6</sup> Riggs v. Fisk, 64 Ind. 100.

<sup>7</sup> See Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 Johns. 124; Bool v. Mix, 17 Wend. 119; Mustard v. Wohlford, 15 Grat. 329; *cf.* Tucker v. Moreland, 10 Pet. 58.



second vendee permit the first vendee to go on and improve, this, with non-notification, may estop them from contesting his title.<sup>1</sup>

§ 62. Where an executory contract by an infant is ratified by him conditionally, after he comes of age, the condition must be complied with, in order to enable the ratification to operate.<sup>2</sup> A promise to pay when able will not be effective as a ratification without proof of ability.<sup>3</sup>

When ratification is conditional condition must be complied with.

§ 63. We have already adverted to the distinction between executed and executory contracts in this relation.<sup>4</sup> An executed or partially executed contract remains in force from the nature of the case, and must be repudiated to be avoided. On principle, also, an executory contract, made during infancy, binds until repudiated; but a refusal to comply with it, on suit being brought, is a repudiation, and when the other party sues after such repudiation, there must be specific proof of intermediate affirmance to overcome the proof of repudiation presented by resisting the suit. It must be shown that the defendant, before the suit was brought, affirmed the contract.<sup>5</sup> "A mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract

Executory contract, if resisted, must be shown to have been ratified.

<sup>1</sup> Bigelow on Est. 3d ed. 484 *et seq.*

<sup>2</sup> *Cole v. Saxby*, 3 Esp. 159; *Thompson v. Lay*, 4 Pick. 150; *Proctor v. Sears*, 4 Allen, 95; *Everson v. Carpenter*, 17 Wend. 419. As to conditions generally, see *infra*, § 545 *et seq.*

<sup>3</sup> *Chandler v. Glover*, 32 Penn. St. 509; then see *Bobo v. Hansell*, 2 Bailey, 114, and see *infra*, §§ 588 *et seq.*

<sup>4</sup> *Supra*, § 56.

<sup>5</sup> *Thrupp v. Fielder*, 2 Esp. 628; *Thornton v. Ellingworth*, 2 B. & C. 824; *Hale v. Gerrish*, 8 N. H. 374; *Robbins v. Eaton*, 10 N. H. 561; *Thompson v. Lay*, 4 Pick. 48; *Rogers v. Hurd*, 4 Day, 57; *Wilcox v. Roath*, 12 Conn. 550; *Bigelow v. Grannis*, 2 Hill, N. Y. 120; *Curtin v. Patton*, 11

S. & R. 305; *Hinely v. Margaritz*, 3 Barr, 428; *Fetrow v. Wiseman*, 40 Ind. 148; *Alexander v. Hutcheson*, 2 Hawks, 535; *Ordinary v. Wherry*, 1 Bailey, 28; *Mayer v. McClure*, 36 Miss. 389; *Ferguson v. Bell*, 17 Mo. 347. And see to same general effect, *Tucker v. Moreland*, 10 Pet. 75; *Robinson v. Weeks*, 56 Me. 102; *Aldrich v. Grimes*, 10 N. H. 194; *Emmons v. Murray*, 16 N. H. 385; *Morrill v. Aden*, 19 Vt. 505; *Hoxie v. Lincoln*, 25 Vt. 206; *Martin v. Mayo*, 10 Mass. 137; *Chandler v. Simmons*, 97 Mass. 871; *Burnham v. Bishop*, 9 Conn. 330; *Kline v. Beebe*, 6 Conn. 494; *Milard v. Hewlett*, 19 Wend. 301; *Spencer v. Carr*, 45 N. Y. 406; *Hoyle v. Stowe*, 2 Dev. & Bat. 320.

made during minority."<sup>1</sup> But a promise to pay, whether in express words, or inferrible from the terms in which the debt is spoken of, constitutes a ratification.<sup>2</sup> There need not, however, be an express promise to pay on demand,<sup>3</sup> provided the promise involves an express adoption of the debt.<sup>4</sup> Part-payment, after attaining majority, however, is not a ratification.<sup>5</sup> —By statute in England, and in several states in this country, a ratification of an executory contract must be in writing.<sup>6</sup> —When a sale of real estate by an infant is repudiated, and defence taken on suit brought on the contract, strong proof of ratification after majority and before repudiation must be adduced to overcome the repudiation.<sup>7</sup>

§ 64. Were an infant not liable for necessities supplied to him at periods when he is absent from home, or without the support of parents or guardians, the privilege of minority, designed for his protection, might expose him to cruel wrong. He might have an estate fully adequate to his support; and yet, as it could not be made available for the payment of necessities, persons on whom he calls to supply him with such necessities might refuse to supply them, or might furnish them only on exorbitant terms.

Infant liable for necessities.

<sup>1</sup> Parker, C. J., *Whitney v. Dutch*, 14 Mass. 457; *Wilcox v. Roath*, 12 Conn. 650; *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill, N. Y. 120; and see *Conklin v. Ogborn*, 7 Ind. 553; *Murray v. Shanklin*, 4 Dev. & B. 289; *Dunlap v. Hales*, 2 Jones, N. C. 381.

<sup>2</sup> *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. 202; *Conaway v. Shelton*, 3 Ind. 334; *Conklin v. Ogborn*, 7 Ind. 553.

<sup>3</sup> *Hale v. Gerrish*, 8 N. H. 376; *Whitney v. Dutch*, 14 Mass. 460; *Martin v. Mayo*, 10 Mass. 137.

<sup>4</sup> *Hale v. Gerrish*, 8 N. H. 374; *Benham v. Bishop*, 9 Conn. 330; *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill, N. Y. 120; *Alexander v. Hutcheson*, 2 Hawks, 535.

<sup>5</sup> *Thrupp v. Fielder*, 2 Esp. 628; *Robbins v. Eaton*, 10 N. H. 561; *Hinely v. Margaritz*, 3 Barr, 428; *Dunlap v. Hales*, 2 Jones, N. C. 381.

<sup>6</sup> See *Hartley v. Wharton*, 11 A. & E. 934; *Stern v. Freeman*, 4 Metc. Ky. 309. In *Hale v. Gerrish*, 8 N. H. 374, an admission that the debt was due, and that the other party would get his pay, but refusing to give a note, was held no ratification.

<sup>7</sup> *Boody v. McKenney*, 23 Me. 517; *Jackson v. Carpenter*, 11 Johns. 542; *Jackson v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 120; *Curtin v. Patton*, 11 S. & R. 517; *Cresinger v. Welsh*, 15 Ohio, 193; and other cases cited, 1 Chit. on Con. 11th Am. ed. 219.

Hence it is a settled principle that for necessities furnished to an infant his estate may be made liable.<sup>1</sup>

§ 65. The liability, however, is only for the value of the things furnished, and not for their price as agreed upon by the parties at the time.<sup>2</sup> Hence a deed given by an infant to secure the payment of necessities is voidable.<sup>3</sup> The value is always open to examination as a question of fact.<sup>4</sup>

But only for value, and not on account stated or note.

§ 66. It has been ruled that a negotiable note given by an infant for necessities is void,<sup>5</sup> and that a debt of this class cannot be charged as a balance of an account stated, even though there be a promise proved to pay such balance.<sup>6</sup> But so far as this involves the position that bills or notes made by infants are always void, it is no longer law. Such paper, even though negotiable, is now held, at common law, voidable only, even though void under statute.<sup>7</sup> And it has been held by high authority, that on a negotiable note given by an infant, the plaintiff may re-

Rule as to negotiable paper.

<sup>1</sup> Co. Lit. 172a; Wharton v. McKenzie, 5 Q. B. 606; Burghart v. Hall, 4 M. & W. 727; Ryder v. Wombwell, L. R. 3 Ex. Ch. 90; Kelly v. Davis, 49 N. H. 187; Gordon v. Potter, 17 Vt. 348; Hussey v. Jewett, 9 Mass. 100; Stone v. Dennison, 13 Pick. 1; Breed v. Judd, 1 Gray, 455; Shelton v. Pendleton, 18 Conn. 417; Strong v. Foote, 42 Conn. 203; Dubose v. Wheddon, 4 McCord, 221; Parsons v. Keys, 43 Tex. 557.

<sup>2</sup> Locke v. Smith, 41 N. H. 346; Earle v. Reed, 10 Met. 387; Price v. Sanders, 60 Ind. 310.

<sup>3</sup> Martin v. Gale, L. R. 4 Ch. D. 428; Ingledew v. Douglass, 2 Stark. 36; Hedgley v. Holt, 4 C. & P. 104; Williams v. Moor, 11 M. & W. 256.

<sup>4</sup> Locke v. Smith, 41 N. H. 346; Earle v. Reed, 10 Met. 387; Swift v. Bennett, 10 Cush. 436; Johnson v. Lines, 6 W. & S. 80; Beeler v. Young,

1 Bibb, 519; Glover v. Ott, 1 McCord, 572; Dubose v. Wheddon, 4 McCord, 221.

<sup>5</sup> McCrillis v. How, 3 N. H. 348; Swasey v. Vanderheyden, 10 Johns. 33; Fenton v. White, 1 South, 100; McMinn v. Richmond, 6 Yerg. 9; Morton v. Steward, 5 Ill. Ap. 553; see, however, *supra*, § 37.

<sup>6</sup> Trueman v. Hurst, 1 T. R. 40; Ingledon v. Douglass, 2 Stark. R. 36.

<sup>7</sup> *Supra*, § 37; Hunt v. Massey, 5 B. & Ad. 902; Boody v. McKenney, 23 Me. 523; Earle v. Reed, 10 Metc. (Mass.) 389; Goodsell v. Myers, 3 Wend. 479; Everson v. Carpenter, 17 Wend. 419; Henry v. Root, 33 N. Y. 526; Hesser v. Steiner, 5 W. & S. 476; Petrow v. Wiseman, 40 Ind. 148; Hyman v. Cain, 3 Jones, L. 111; Dubose v. Wheddon, 4 McCord, 221; Cheshire v. Barrett, 4 McCord, 241; McMinn v. Richmond, 6 Yerg. 9.

cover for as much of the debt as is incurred for necessities.<sup>1</sup>

§ 67. The object of restrictions of this class being to postpone business capacity until the age of twenty-one, articles furnished to an infant to enable him to carry on trade, no matter how essential these articles may be to his credit, or how dependent he may be on his business, are not considered necessities.<sup>2</sup> On the same reasoning, articles required by him in farming, in which he is engaged, are not considered necessities.<sup>3</sup> Such articles, however, in a bill of sale of this class, as are used by him in the necessary support of his family, are excepted from this rule.<sup>4</sup>

§ 68. Under necessities are included services as well as goods, provided, as will presently be seen, they are reasonably called for by the infant's condition of life.<sup>5</sup> Under this head fall teaching a trade to an infant;<sup>6</sup> his literary education, suitable to his social position;<sup>7</sup> the preparation of a proper marriage settlement;<sup>8</sup> the burial, with suitable expense, of the infant's husband;<sup>9</sup> and the due support of the infant's wife;<sup>10</sup> and of his children.<sup>11</sup>

§ 69. What are necessities in one station of life may not be necessities in other stations of life. It is important for the

<sup>1</sup> Earle v. Reed, 10 Metc. (Mass.) 479; Price v. Saunders, 60 Ind. 310; see Bradley v. Pratt, 23 Vt. 378; Guthrie v. Morris, 22 Ark. 411, and see as to divisible considerations, *infra*, § 511.

<sup>2</sup> Love v. Griffith, 1 Scott, 458; Latt v. Booth, 3 C. & K. 292; Mason v. Wright, 13 Met. 308; Merriam v. Cunningham, 11 Cush. 40; though see Rundell v. Keeler, 7 Watts, 237; Watson v. Hensil, 7 Watts, 344, to the effect that an infant with his guardian's assent may so bind himself.

<sup>3</sup> Decell v. Lowenthal, 57 Miss. 331.

<sup>4</sup> Turberville v. Whitehouse, 1 C. & P. 94; 12 Price, 692.

<sup>5</sup> *Infra*, § 69.

<sup>6</sup> Cooper v. Simmons, 7 H. & N. 707.

<sup>7</sup> Manby v. Scott, 1 Sid. 112; Peters v. Fleming, 6 M. & W. 48; Baker v. Lovett, 6 Mass. 78; Middlebury College v. Chandler, 16 Vt. 682; Raymond v. Loyl, 10 Barb. 489.

<sup>8</sup> Helps v. Clayton, 17 C. B. N. S. 553.

<sup>9</sup> Chapple v. Cooper, 13 M. & W. 252.

<sup>10</sup> Turner v. Trisby, 1 Stra. 168; Abell v. Warren, 4 Vt. 149; Tupper v. Cadwell, 12 Met. 562; Roach v. Quick, 9 Wend. 238, and cases cited *infra*, § 69.

<sup>11</sup> 1 Ch. on Con. 11th Am. ed. 197; Beeler v. Young, 1 Bibb, 520, and cases cited in last note.

public interests, that a boy who is to inherit a large estate should be brought up with liberal tastes, so that his money can afterwards be dispensed in such a way as to promote public culture, and that his mind should be improved so that his influence should be afterwards used wisely and effectively. Hence it is, that he will be entitled, when under age, to such use of his estate, as will secure those ends; and when this is not done by special allowance granted to his guardians, the same end is effected by making him personally liable to parties who, on fair terms, furnish him with goods by which not merely his education, but his liberal support and training, in view of his future responsibilities, may be promoted.<sup>1</sup> But horses furnished for the purposes of pleasure are not necessities;<sup>2</sup> though it may be otherwise when their use is requisite to health, and they are not unsuited to the infant's condition and means,<sup>3</sup> while, as has already been noticed, adaptation to station is a question of law for the court. Whether goods furnished are "necessaries or not, is a question of fact for the jury, depending on the circumstances; and the two principal circumstances are, whether the articles are suitable to the minor's estate, and whether he is, or is not, without other means of supply." . . . "Whether the articles sued for were necessities or not, is a question of fact, to be submitted to a jury, unless in a very clear case, where a judge would be warranted in directing a

Necessaries  
condition-  
ed on sta-  
tion of life.

<sup>1</sup> *Maddox v. Miller*, 1 M. & S. 738; *facie* necessary, see *Bryant v. Richard-Peters v. Fleming*, 6 M. & W. 42; *Davis v. Caldwell*, 12 Cush. 512; *McKenna v. Merry*, 61 Ill. 177. As illustrating the limit in this respect, see *Hedgley v. Holt*, 4 C. & P. 104; *Charters v. Bayntun*, 7 C. & P. 52; *Davis v. Caldwell*, 12 Cush. 513; *Strong v. Foote*, 42 Conn. 203; *Rundel v. Keeler*, 7 Watts, 237; *Mohney v. Evans*, 51 Penn. St. 80; *Beeler v. Young*, 1 Bibb, 519. That even the guardian's assent will not sustain extravagant charges, see *Johnson v. Lines*, 6 W. & S. 80. That cigars and tobacco are not *prima*

son, L. R. 3 Ex. 93, n. (3); 14 L. T. N. S. 24; and that without proof of special circumstances sustaining them, articles of luxury or hospitality are not necessities, see *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, 5 Q. B. 606; *Ryder v. Wombwell*, L. R. 3 Ex. 90; *Leake*, 2d ed. 550.

<sup>2</sup> *Rainwater v. Durham*, 2 Nott & McC. 524; see *Mason v. Wright*, 13 Met. 306.

<sup>3</sup> *Cornelia v. Ellis*, 11 Ill. 584; see 1 Ch. Cont. 11th Am. ed. 234.

jury authoritatively that some articles, as, for instance, diamonds or race horses, cannot be necessities for any minor.”<sup>1</sup> But the finding of the jury in such respect is open to revision by the court; and in a recent English case, the court of exchequer chamber held that a jury were not at liberty to find that jewelled cuff buttons of the price of 25*l.* are necessities to a young man of fortune.<sup>2</sup>—As has been already incidentally noticed, necessities furnished for the support of an infant’s wife and children are to be regarded as furnished to himself. “What is supplied to them on his express or implied credit is considered as purchased by him.”<sup>3</sup>

§ 70. As necessities cannot be regarded goods supplied

<sup>1</sup> Shaw, C. J., *Davis v. Caldwell*, 12 Cush. 512; and see *Peters v. Fleming*, 6 M. & W. 42; *Wharton v. Mackenzie*, 5 Q. B. 606; *Bent v. Manning*, 10 Vt. 225; *Merriam v. Cunningham*, 11 Cush. 40; *Hall v. Weir*, 1 Allen, 261; *Eames v. Sweetzer*, 101 Mass. 78; *Johnson v. Lines*, 6 W. & S. 80. In *Peters v. Fleming*, 6 M. & W. 42, it was said by Parke, J., with the approval of Gurney and Rolfe, BB., that the true rule is, “that all such articles as are purely ornamental are not necessary, and are to be rejected because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary uses of the party, in order to support himself properly in the degree, style, and station of life in which he moves: if they were, for such articles the infant may be responsible. That must be a question for the jury.” While whether the articles were necessary in the infant’s particular station is a mixed question of law and fact, the question of imposition is mainly one of fact. *Harrison v. Fane*, 1 M. & G. 550; *Wharton*

*v. Mackenzie*, 5 Q. B. 611; *Dalton v. Gib*, 7 Scott, 117; *Ryder v. Wombwell*, L. R. 4 Exch. 38; *Phelps v. Worcester*, 11 N. H. 51; *Bent v. Manning*, 10 Vt. 225; *Bradley v. Pratt*, 23 Vt. 378; *Tupper v. Cadwell*, 12 Met. 562; *Stannton v. Wilson*, 3 Day, 37; *Johnson v. Lines*, 6 W. & S. 80; *Rivers v. Gregg*, 5 Rich. Eq. 274; *Lefils v. Sugg*, 15 Ark. 137.

<sup>2</sup> *Ryder v. Wombwell*, L. R. 4 Ex. 32; reversing S. C., L. R. 3 Ex. 90; see *Burghart v. Angerstein*, 6 C. & P. 690; *Hands v. Slaney*, 8 T. R. 578. An infant who was a member of a volunteer corps, was held by Lord Ellenborough liable for regimentals sold him; the country being at war at the time, and volunteers being called out for the public defence. *Coates v. Wilson*, 5 Esp. 152 —A captain in the army, who is an infant, is liable for the livery of a servant, but not for cockades ordered for soldiers in his company; *Hands v. Slaney*, 8 T. R. 578.

<sup>3</sup> *Benj. on Sales*, 3d Am. ed. § 25, citing *Turner v. Trisby*, 1 Str. 168; *Abell v. Warren*, 4 Vt. 149; *Tupper v. Cadwell*, 12 Met. 562; *Roach v. Quick*, 9 Wend. 238; *Beeler v. Young*, 1 Bibb, 519.

to an infant living at home and there suitably maintained.<sup>1</sup> And articles with which an infant is already supplied by parent or guardian are not necessities.<sup>2</sup> But the mere fact that an infant has an income paid into his own hands which would have enabled him to have paid for all articles he required, does not preclude a tradesman supplying him with necessities from recovering.<sup>3</sup>

Infant must be without home support.

§ 71. If an infant's property is exposed to waste or other peril, the proper course is to apply to his guardian for the pay of services in its preservation. Hence it has been held that an infant is not liable to a third party for the premium on insuring his property;<sup>4</sup> nor for repairs done to his house which would otherwise have been in danger of great dilapidation;<sup>5</sup> nor for expenses of law-suits, unless absolutely essential to the infant's personal support, the guardian being the party to act in such cases under the court having charge of the infant's estate.<sup>6</sup>

Services rendered in preserving infant's property not necessities.

§ 72. Money is not ordinarily included under the head of necessities.<sup>7</sup> Even though actually spent by the infant in the purchase of necessities, it cannot, such is the prevalent English opinion, be recovered from the infant by the lender.<sup>8</sup> In this country, however, it has been held that a person lending money to an infant to purchase specific necessities stands in the position of the trades-

Moneys lent not necessities.

<sup>1</sup> *Bainbridge v. Pickering*, 2 W. Black. 1325; *Angel v. McLellan*, 16 Mass. 28; *Wailing v. Toll*, 9 Johns. 141; *Bredin v. Diven*, 2 Watts, 95; *Guthrie v. Murphy*, 4 Watts, 80; *Johnson v. Lines*, 6 W. & S. 80.

<sup>2</sup> *Swift v. Bennett*, 10 Cush. 436; *Davis v. Caldwell*, 12 Cush. 512; *Strong v. Foote*, 42 Conn. 203; *Kline v. L'Amoreaux*, 2 Paige, 419; *Hull v. Conolly*, 3 McCord, 6; *Beeler v. Young*, 1 Bibb, 579; *Simms v. Norris*, 5 Ala. 42; *Perrin v. Wilson*, 10 Mo. 451; *Parsons v. Keys*, 43 Tex. 557. But in *Ryder v. Wombwell*, L. R. 3 Ex. 90, it was held that evidence that the infant was already well supplied, without evidence

that the plaintiff knew this, was inadmissible; though see, *contra*, *Foster v. Redgrave*, L. R. 4 Ex. 35, n. (8). This point was left open in *Ryder v. Wombwell*, L. R. 4 Ex. 42. See *Leake*, 2d ed. 551.

<sup>3</sup> *Burghart v. Hall*, 4 M. & W. 727; *Peters v. Fleming*, 6 M. & W. 42.

<sup>4</sup> *Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345.

<sup>5</sup> *Tupper v. Cadwell*, 12 Met. 562.

<sup>6</sup> *Phelps v. Worcester*, 11 N. H. 51; *Thrall v. Wright*, 38 Vt. 494.

<sup>7</sup> *Darby v. Boucher*, 1 Salk. 279; *Walker v. Simpson*, 7 W. & S. 83.

<sup>8</sup> *Ellis v. Ellis*, 5 Mod. 368; 1 Ld. Raym. 344.

man who furnishes the necessities;<sup>1</sup> and, when an infant is pressed for a debt for necessities, the party lending him money to pay such debt can recover the loan from him.<sup>2</sup>

§ 73. An adult entering into an engagement of marriage with an infant is bound by the contract, though the infant's contract to marry is voidable.<sup>3</sup> Hence, while an infant may sue on such a contract, he is not liable to be sued, though he may ratify it when of full age, in which case he would become liable.<sup>4</sup>

Marriage settlements by an infant are voidable, though since, when a female infant marries a husband of full age, her personal property at common law passes to him when he assumes possession, the settlement of her personal property made by a duly executed marriage contract binds the husband, impressing on the property thus taken by him the conditions of the particular trust.<sup>5</sup> But, unless authorized by statute, even an order of the chancellor having jurisdiction does not operate to make a marriage contract, otherwise invalid, binding on an infant.<sup>6</sup> And a settlement made by a female infant, in contemplation of marriage, is voidable;<sup>7</sup> though after marriage and during coverture she is (unless by statute) incapable of disaffirming it.<sup>8</sup>

§ 74. We have already seen<sup>1</sup> that an infant by continuing

<sup>1</sup> *Conn v. Coburn*, 7 N. H. 368; *Price v. Sanders*, 60 Ind. 310; *Watson v. Cross*, 2 Duv. 147.

<sup>2</sup> *Randall v. Sweet*, 1 Denio, 460. See to same effect, *Clarke v. Leslie*, 5 Esp. 28.

<sup>3</sup> *Holt v. Clarencieux*, 2 Str. 937; *Hunt v. Peeke*, 5 Cow. 475; *Willard v. Stone*, 7 Cow. 22; *Hamilton v. Lomax*, 26 Barb. 615; *Leichtweiss v. Treskow*, 21 Hun, 489; *Rush v. Wick*, 31 Oh. St. 521; *Develin v. Riggsbee*, 4 Ind. 464; *Cannon v. Alsbury*, 1 A. K. Mar. 76; *Warwick v. Cooper*, 5 Sneed, 659; see *Tyler on Inf.* 2d ed. 58.

<sup>4</sup> *Ib.*; *Pollock on Cont.* 3d Eng. ed. 56; *Warwick v. Bruce*, 2 M. & S. 205; *Pool v. Pratt*, 1 Chipm. 252; *Cannon v. Als-*

*bury*, 1 A. K. Marsh. 76. Under the *Infant's Relief Act* (*supra*, § 43), an infant's promise of marriage is void, and a ratification of it at full age does not bind the infant. *Rowe v. Hopwood*, L. R. 4 Q. B. 1; *Coxhead v. Mullis*, 3 C. P. D. 439; *Northcote v. Doughty*, 4 C. P. D. 435; *Ditcham v. Worrall*, 5 C. P. D. 410.

<sup>5</sup> *Pollock on Cont.* 3d Eng. ed. 57, citing *Davidson's Conv.* 3 (pt. 2), 728; and see *Drury v. Drury*, 2 Eden, 39; *McCartee v. Teller*, 2 Paige, 511.

<sup>6</sup> *Field v. Moore*, 7 D. M. G. 691, 710.

<sup>7</sup> *Milner v. Harewood*, 18 Ves. 259.

<sup>8</sup> *Temple v. Hawley*, 1 Sandf. Ch. 153.

<sup>9</sup> *Supra*, §§ 60 *et seq.*



in possession after majority may be estopped from asserting an adverse claim, and that enjoyment of the fruits of a contract may estop him from contesting the contract. The doctrine of estoppel has been extended further, and it has been held that an infant who encourages a purchaser to buy an estate on a particular title may be afterwards equitably estopped from asserting an adverse right.<sup>1</sup> But to make such estoppel effectual it should be based on an attitude which is intelligent, deliberate, and persistent. If mere transient approval by an infant of another's purchase should bar the infant's rights, the protection of infancy would be destroyed. His rights would be assigned away indirectly in the face of a rule established by the policy of the law that his direct assignment of such rights would be invalid.<sup>2</sup> In cases of fraud, however, the better doctrine, as Mr. Bigelow well states,<sup>3</sup> is that infants of years of discretion, as well as married women, "may be estopped to set up a claim to their property against a purchaser. Both are liable when properly sued for their torts in an action which does not seek the enforcement of a contract or demand damages for repudiating or for fraudulently inducing the plaintiff to make a contract; and in an action for a fraudulent representation of title, whereby the plaintiff has been induced to expend money for the purchase of property belonging in reality to the defendant, the measure of damages must, of course, be the sum paid. Now to prevent a circuitry of action (which, indeed, is the ground of many estoppels, if not also of this very class of equitable estoppels), it is but right, on analogy, that the infant or *feme* should be rebutted when proceeding to regain possession."<sup>4</sup> But an infant who has obtained credit by represent-

Infant  
may be  
estopped.

<sup>1</sup> Bispham's Eq. 2d ed. § 293; Bigelow on Estoppel, 447, (3d ed. 515;) Overton v. Banister, 3 Hare, 503; Esron v. Nicholas, 1 D. G. & S. 118; Thompson v. Simpson, 2 Jones & L. 110; Stikeman v. Dawson, 1 D. G. & S. 90; Wright v. Snowe, 2 D. G. & S. 321; Nelson v. Stocker, 4 D. G. & J. 458; Hall v. Timmons, 2 Rich. Eq. 120; Whittington v. Wright, 9 Ga. 23; and see Jennings v. Whitaker, 4 Monroe, 51.

<sup>2</sup> See as to estoppel of married women, *infra*, § 89.

<sup>3</sup> Op. cit. 3d ed. 516.

<sup>4</sup> See Story Eq. Jur. § 380; Stikeman v. Dawson, 1 D. G. & S. 90; Unity Ass. v. King, 3 D. G. & J. 63;

ing himself of full age is not estopped from afterwards setting up infancy.<sup>1</sup> Nor is an infant estopped by a recital of his age in an indenture of apprenticeship.<sup>2</sup>

Telegraph Co. *v.* Davenport, 97 U. S. 369; *Com. v. Sherman*, 18 Penn. St. 343; *Merritt v. Horne*, 5 Oh. St. 307; *Goodman v. Winter*, 64 Ala. 410.      Stoolfoos *v.* Jenkins, 12 S. & R. 399; see *Cook v. Toumbes*, 36 Miss. 685.      <sup>2</sup> *Houston v. Turk*, 7 Yerg. 13. As to the analogous case of estoppel of married women, see *infra*, § 89. As to how far deceit in this respect may be set off, see *supra*, § 52.

## CHAPTER III.

## MARRIED WOMEN.

At common law, married women, with certain limitations, cannot contract, § 76.

But woman with separate estate may bind such estate, § 77.

May contract for services, but not for goods or money, § 77 *a*.

Cannot bind future acquired estate, § 78.

By statute disability has been much qualified, § 79.

Divorce creates independent liability, § 80.

Otherwise as to mere separation, § 81.

Her contracts before marriage pass to husband, § 82.

Husband liable for wife's torts, § 83.

Wife may bind husband as agent, § 84.

Husband may be wife's agent, § 85.

Husband cannot divest himself of his duty by his own wrong, § 86.

But liability ceases when wife leaves without cause, § 87.

And when wife separates with allowance, § 88.

Married women may be bound by estoppel, and may enforce executed contracts, § 89.

Contracts for future separation invalid, § 90.

Agreements between husband and wife void, § 91.

Husband liable for necessities furnished wife, § 92.

§ 76. BY the common law of England, a married woman may bind herself and her estate by contract, in the following cases: 1. When her husband has been absent, unheard from for seven years, though he may really at the time be alive;<sup>1</sup> and this has in some states been extended to all cases of final and permanent abandonment.<sup>2</sup> But mere temporary desertion does not by itself have this effect.<sup>3</sup> Hence, a note given by a wife, whose husband had deserted her, while living apart

At common law married women, with certain exceptions, cannot contract.

<sup>1</sup> *Doe v. Jesson*, 6 East, 80; *Loring v. Steineman*, 1 Metc. Mass. 211; *King v. Paddock*, 18 Johns. 141. In *Valentine v. Ford*, 2 Browne, 193, it was held that an absence of two years might have this effect. In *Black v. Tricker*, 59 Penn. St. 13, desertion by husband, leaving the wife dependent on her own exertions for support, was held to entitle her to be decreed a *feme*

*sole trader*. As to the presumption of death in such cases see *Whart. on Ev.* § 1274. And see *Schouler, Husb. and Wife*, §§ 89 *et seq.*

<sup>2</sup> *Rhea v. Renner*, 1 Pet. 105; *Ayer v. Warren*, 47 Me. 217; *Gregory v. Pierce*, 4 Metc. Mass. 478; *Black v. Tricker*, 59 Penn. St. 13.

<sup>3</sup> *Infra*, § 82.

from him, for necessities used by her in her own support, is void, and her promise to pay it, made after her divorce and before her remarriage, is without consideration and invalid.<sup>1</sup> —When, however, the desertion is such as to entitle her to an independent domicile, in which she is thrown on her own resources for support, then she may independently sue and be sued.<sup>2</sup> 2. When her husband has been banished from the country, or when a punishment imposed on him has been commuted on the condition of expatriation, though on his return her independence in this respect is lost.<sup>3</sup> 3. Where the husband is an alien, and the wife, deserted by him, does business as a *feme sole*.<sup>4</sup> 4. When, by local custom, she is a *feme covert* trader, her husband not meddling with her trading.<sup>5</sup> In Pennsylvania this privilege is given and limited by statute.<sup>6</sup> Desertion, leaving the wife dependent on her own exertions, may entitle her to be regarded as a *feme sole* trader.<sup>7</sup> In South Carolina, also, the custom of London in this respect is recognized. But it is limited to matters of shop-keeping.<sup>8</sup> With

<sup>1</sup> Hayward v. Barker, 52 Vt. 429.

<sup>2</sup> *Infra*, § 81.

<sup>3</sup> Carrol v. Blencow, 4 Esp. 27; Spooner v. Brewster, 2 C. & P. 35; Cornwell v. Hoyt, 7 Conn. 420; Troughton v. Hill, 2 Hayw. 406. That a sentence of the husband to transportation, although he has not yet been sent away, enables her to bind herself, see Franks *ex parte*, 7 Bing. 762; and also when he remains away after his transportation. Carrol v. Blencow, 4 Esp. 27.

<sup>4</sup> On this topic, Mr. Pollock, 3d ed. 81, after commenting on Walford v. Duchess de Pienne, 2 Esp. 554; Franks v. same deft., *ibid.* 587; Gaillon v. L'Aigle, 1 Bos. & P. 357; Kay v. Duchess de Pienne, 3 Camp. 123; Barden v. Keverberg, 2 M. & W. 61; concludes, "that it would be enough to show that the husband never had an English domicile, or, at all events, to show that he never resided in England." In De Wahl v. Braune, 1 H. & N. 178, it was held that a wife could not sue during

coverture, although her husband was an alien, resident in Russia, while she was an English subject. In the same case it was further held that the fact that the husband was an alien enemy does not give the wife business capacity.

<sup>5</sup> Caudell v. Shaw, 4 T. R. 361; Beard v. Webb, 2 Bos. & Pul. 93; and see Schouler, Husband and Wife, §§ 97 *et seq.*

<sup>6</sup> Jacobs v. Featherstone, 6 W. & S. 646.

<sup>7</sup> Valentine v. Ford, 2 Brown, 193. Whether a decree of court is necessary, see Black v. Tricker, 59 Penn. St. 13; Hentz v. Clawson, 34 Leg. Int. 5; Cleaver v. Scheetz, 70 Penn. St. 496; Westernitz v. Porter, 86 Penn. St. 35. As to statute giving deserted wife this privilege, see King v. Thompson, 87 Penn. St. 365.

<sup>8</sup> Surtell v. Brailsford, 2 Bay, 333; McDowall v. Wood, 2 Nott & McC. 242; Starr v. Taylor, 4 McCord, 413; and see Radford v. Carwile, 13 W. Va. 572.

these exceptions, a married woman is at common law incapable of making a contract on which she can sue or be sued. Even for her earnings, at common law, he alone can sue, though living separate from her.<sup>1</sup>

§ 77. A married woman, who has a separate estate, is, in England, capable in equity of binding such estate under certain limitations. These limitations are thus condensed by Mr. Pollock from recent English adjudications.—1. “Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estate;”<sup>2</sup> and property settled to a married woman’s separate use for her life, with power to dispose of it by deed or will, is for this purpose her separate estate, her power, however, being limited by the instrument creating it.<sup>3</sup>—2. To make a general engagement thus binding on her separate estate, it must appear “that the engagement was made with reference to and upon the faith and credit of that estate.”<sup>4</sup> And the intention to charge

Woman with separate estate may bind such estate.

<sup>1</sup> *Glover v. Drury Lane*, 2 Chit. R. 117; *Winslow v. Croker*, 17 Me. 29; *Howes v. Bigelow*, 13 Mass. 384; *Washburn v. Hale*, 10 Pick. 429; *Morgan v. Bank*, 14 Conn. 99; *Hyde v. Stone*, 9 Cow. 230.

<sup>2</sup> *Johnson v. Gallagher*, 3 D. F. J. 514; aff. in *London, etc. Bank of Australia v. Lempriere*, L. R. 4 P. C. 572.

<sup>3</sup> *Mayd v. Field*, L. R. 3 Ch. D. 587; *Godfrey v. Harben*, L. R. 13 Ch. D. 216; *Davies v. Jenkins*, L. R. 6 C. D. 728; *Poole’s Est.*, L. R. 6 C. D. 739; see, to same effect in this country, *Cheever v. Wilson*, 9 Wall. 108; *Stephen v. Beall*, 22 Wall. 329; *Heburn v. Warner*, 112 Mass. 271; *Insurance Co. v. Babcock*, 42 N. Y. 613; *McVey v. Cantrell*, 70 N. Y. 295; *Maurer’s App.*, 86 Penn. St. 380; *Phillips v. Graves*, 20 Oh. St. 371; *Patrick v. Littell*, 36 Oh. St. 79; *Whitesides v. Cannon*, 23 Mo. 457; *Davis v. Smith*, Sup. Ct. Mo. 1881; *Hooton v. Ransom*, 6 Mo. Ap. 19; *Burnett v. Hawpe*, 25

*Grat.* 481; *Harshberger v. Alger*, 81 *Grat.* 52; and cases cited in *Wald’s Pollock*, 69, and *Story’s Eq.* § 1397. In *Robinson v. Pickering*, 44 L. T. R. N. S. 165, L. R. 16 Ch. D. 660, it was ruled that an *ad interim* injunction by a creditor will not be granted to restrain a married woman from dealing with her separate property until judgment. See *London Law Times*, 10th April (p. 412) and 15th May (p. 38), 1880; 2d April (p. 382), 1881.

<sup>4</sup> *Johnson v. Gallagher*, 3 D. F. J. 515; *London Bank of Australia v. Lempriere*, L. R. 4 P. C. 572; see *Conn v. Conn*, 1 Md. Ch. 212; *Burch v. Breckenridge*, 16 B. Mon. 482. In *Patrick v. Littell*, 36 Oh. St. 79, it was held that an agreement by a married woman to pay for services to be rendered in procuring a loan of money to remove a mortgage on her real estate binds her separate estate.—*Boynton, J.* said; “She” (the plaintiff), “being the owner of a separate estate, which

her separate estate must distinctly appear; and the trust establishing the separate estate should be so guarded as to carry out the purpose for which it was created.<sup>1</sup>—3. Debts contracted by a married woman, living apart from her husband, are presumed to have been intended by her to be charged to her separate estate;<sup>2</sup> and the same presumption exists when a married woman gives a guarantee of her husband's debt,<sup>3</sup> or

was heavily incumbered by mortgage, engaged the defendants in error, her husband joining, to secure for her a loan of \$10,000 to enable her to remove the mortgage from her estate. She agreed to pay an attorney's fee for making an examination of her title, and a commission of \$100 to the defendants for securing the loan. The services stipulated for were fully performed, the defendants paying \$50 from their own funds to the attorney making the abstract of title. The plaintiff refused to accept the loan, or to pay for the services rendered in procuring it. We have no hesitancy in pronouncing the agreement made to be one not only having direct reference to Mrs. Patrick's separate estate, but made for its benefit. The object was to remove an existing incumbrance upon the property, and it was to accomplish this object that the services of the defendants were engaged. The fact that the loan was to be secured by a new mortgage upon the same property affects the question but very little. She was to get rid of a mortgage debt then due and pressing, by substituting another therefor, to become due ten years thereafter. The question is, whether an intention upon the part of Mrs. Patrick to charge her separate estate with payment for the services rendered, and money paid by defendants, for the benefit of such estate, will be implied from the character of the transaction and the nature

of the engagement entered into. The principles announced in previous adjudications of this court require an affirmative answer to this question. 20 Ohio St. 371; 35 ib. 270; ib. 296. Holding the separate estate of Mrs. Patrick liable to the defendants' demand, we are also of the opinion that a personal judgment against her was proper. Her obligation is one upon which, were she sole, she would be liable at law. It is a contract or obligation upon which, under § 28 of the Code, as amended March 30, 1874, she might have been sued alone; and being of that character, the statute requires the like judgment to be rendered and enforced, in all respects, as if she were unmarried. 71 Ohio Laws, 47. It was one of the objects of this section, as thus amended, to so far modify the disabilities of coverture as to authorize a personal judgment to be rendered against a married woman, where such judgment would have been proper had she remained unmarried."

<sup>1</sup> *Pike v. Fitzgibbon*, L. R. 17 Ch. D. 454; 44 L. T. N. S. 562; *Rice v. R. R.*, 32 Oh. St. 380; *Pfirsching v. Falsh*, 87 Ill. 260; *Collins v. Underwood*, 33 Ark. 265.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Morrell v. Cowan*, L. R. 6 Ch. D. 166. This topic is well discussed in *Schouler on Husb. and Wife*, §§ 184 *et seq.*

makes with him a joint promissory note,<sup>1</sup> or gives her note in payment of her husband's debt.<sup>2</sup> But on such engagements, a married woman cannot be personally sued. The remedy is *in rem* against the separate estate.<sup>3</sup> The execution by a married

<sup>1</sup> *Davies v. Jenkins*, L. R. 6 Ch. D. 728. To this Mr. Wald, the American editor of *Pollock on Contracts*, adds, *Williams v. Urmston*, 35 Oh. St. 296; *Cowles v. Morgan*, 34 Ala. 535; *Nunn v. Givham*, 45 Ala. 375; *Burnett v. Hawpe*, 25 Grat, 481; *Lincoln v. Rowe*, 51 Mo. 571.

<sup>2</sup> *Wicks v. Mitchell*, 9 Kan. 80, cited *Wald's Pollock*, 69.

<sup>3</sup> *Johnson v. Gallagher*, 3 D. F. & J.; *Rogers v. Ward*, 8 Allen, 389. For form of decree, so as to bind personal estate, see *Picard v. Hine*, L. R. 5 Ch. 274. Mr. Pollock holds the older cases, cited in Sug. V. & P. 206, to be overruled, referring to *Picard v. Hine*, *ut supra*; *Pride v. Bubb*, L. R. 7 Ch. 64; He adds, "that the separate estate is regarded as a sort of artificial person created by courts of equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being."—And in support of this view is cited by Mr. Wald, the following from *Grissell in re*, L. R. 12 Ch. D. 490: "It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement. She herself is not a debtor, within the meaning of the bankruptcy act." To the same effect, see *Bispham's Equity*, § 102.—In *Mathewman's case*, L. R. 3 Eq. 781, the law was stated to be that if a married woman, "having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme*

*sole*, would constitute her a debtor, and in entering into such engagements she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable." This is adopted by Mr. Benjamin, Sales, 3d Am. ed. § 37, citing further *Shattock v. Shattock*, L. R. 2 Eq. 182; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; and see *Butler v. Cumpston*, L. R. 7 Eq. 20. That a note given by a married woman in payment of property purchased by her is to be inferred to have been meant to bind her separate estate, see *Williams v. Urmston*, 35 Oh. St. 296.—In Vermont it is ruled that a married woman is only *sub modo a feme sole* in dealing with her separate estate; but such estate, whether real or personal, will be liable for her debts contracted in its management, and for its benefit, or for her benefit on the credit of such estate, unless the instrument creating such estate protects it from being charged with such debts. *Dale v. Robinson*, 51 Vt. 20; *Priest v. Cone*, 51 Vt. 495.—Such is the case in Rhode Island when she declares expressly and in writing, that her intention was to charge her separate estate, but otherwise not. *Elliot v. Gower*, 12 R. I. 79; *Angell v. Cullough*, 12 R. I. 47; see *Schouler, Husb. and Wife*, §§ 246 *et seq.*—The English rule is stated by Mr. Bispham to be that "the separate property of a married woman being a creature of equity, it follows, that if she has the power to deal with it, she has the

woman, of a formal separate instrument of indebtedness, has been held evidence of an intention on her part in this way to bind her separate estate,<sup>1</sup> and an assignee with notice is bound by such action on her part.<sup>2</sup> But unless the consideration of the obligation passes to the married woman herself, the intention to bind her separate estate, such is the better opinion, must appear on the document, to subject her separate estate to liability for the payment.<sup>3</sup> Whether the engagement was made in reference to the wife's separate estate, is a matter to be determined from all the circumstances of the particular case; and, as we have seen, the inference is peculiarly strong where it appears that the wife is living apart from her hus-

other power incident to property in general, viz., the power of contracting debts to be paid out of it; and equity will lay hold of the separate estate as the only means by which those debts can be satisfied.' Bispham's Eq. § 102. This view has been accepted in numerous courts in the United States. *Cheever v. Wilson*, 9 Wall. 119; *Batchelder v. Sargent*, 47 N. H. 265; *Frery v. Booth*, 37 Vt. 78; *Welland v. Eastham*, 15 Gray, 328; *Imlay v. Huntington*, 20 Conn. 175; *Wells v. Thorman*, 37 Conn. 318; *Gardner v. Gardner*, 7 Paige, 112; *Yale v. Dederer*, 18 N. Y. 265; *Ballin v. Dillaye*, 37 N. Y. 35; *Gosman v. Cruger*, 69 N. Y. 87; *Johnson v. Cummins*, 1 C. E. Green, 99; *Van Kirk v. Skillman*, 5 Vroom, 109; *Leaycraft v. Hedden*, 3 Green Ch. 512; *Perkins v. Elliott*, 8 C. E. Green, 529; *Johnson v. Vail*, 1 McCarter, N. J. 423; *Cooke v. Husbands*, 11 Md. 492; *Buchanan v. Turner*, 26 Md. 5; *Vizonneau v. Pegram*, 2 Leigh, 183; *Penn v. Whitehead*, 17 Grat. 503; *Greenough v. Wigginton*, 2 Greene, Iowa, 435; *Harris v. Harris*, 7 Ired. Eq. 111; *Coleman v. Wooley*, 10 B. Mon. 320; *Fears v. Brooks*, 12 Ga. 200; *Dallas v. Heard*, 32 Ga. 604; *Gunter v. Williams*, 40 Ala. 572; *Whitesides v. Cannon*, 23

Mo. 457; *Schafroth v. Ambs*, 46 Mo. 114; *Kimm v. Weipport*, 46 Mo. 532; *Lewis v. Yale*, 4 Fla. 418; *Miller v. Newton*, 23 Cal. 554; *Hutchinson v. Underwood*, 27 Tex. 255. That a more restricted view is maintained in several state courts will be hereafter seen.

<sup>1</sup> Bispham's Eq. § 102; *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Batchelder v. Sargent*, 47 N. H. 262; *Leaycraft v. Hedden*, 3 Green, Ch. 512; *Perkins v. Elliott*, 8 C. E. Green, 529; *Phillips v. Graves*, 20 Oh. St. 371; *Vizonneau v. Pegram*, 2 Leigh, 183; *Garland v. Pamplin*, 32 Grat. 305; *Coleman v. Wooley*, 10 B. Mon. 320; *Ozley v. Ikelleimer*, 26 Ala. 332; *Kimm v. Weipport*, 46 Mo. 532; *Metropolitan Bank v. Taylor*, 62 Mo. 338.

<sup>2</sup> *Warne v. Routledge*, L. R. 18 Eq. 500.

<sup>3</sup> *Nourse v. Henshaw*, 123 Mass. 96; *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; 68 N. Y. 329; *Manhattan Co. v. Thompson*, 58 N. Y. 80; *Johnson v. Cummins*, 1 C. E. Green, 97; *Harrison v. Stewart*, 3 C. E. Green, 451; *Peake v. La Baw*, 21 N. J. Eq. 269; *Pippen v. Wesson*, 74 N. C. 437; see *Schouler on Husb. and Wife*, §§ 237 *et seq.*



band, receiving no maintenance from him.<sup>1</sup> In some jurisdictions in the United States, however, a married woman, on whom a separate estate has been settled, has no power over such estate beyond what is given to her by the instrument creating it, and this instrument is to be so construed as to give her no power of disposal beyond what its terms expressly specify.<sup>2</sup>—By a clause forbidding the anticipation of income, a married woman may have a separate income so secured to her as to be protected against her own debts.<sup>3</sup>—A clause prohibiting anticipation or alienation takes away the

<sup>1</sup> *Picard v. Hine*, L. R. 5 Ch. Ap. 274; *Johnson v. Gallagher*, 3 De G. F. & J. 494.

\* *Imlay v. Huntington*, 20 Conn. 146; *Metcalf v. Cook*, 2 R. I. 355; *Lancaster v. Dolan*, 1 Rawle, 231; *Thomas v. Folwell*, 2 Whart. R. 11; *Wright v. Brown*, 44 Penn. St. 224; *Shonk v. Brown*, 61 Penn. St. 320; *Swift v. Castle*, 23 Ill. 209; *Cookeson v. Toole*, 59 Ill. 515; *Bressler v. Kent*, 61 Ill. 426; *Hume v. Hood*, 5 Grat. 374; *Harris v. Harris*, 7 Ired. Eq. 111; *Ewing v. Smith*, 3 Dessaus. 417; *Reid v. Lamar*, 1 Strobb. Eq. 27; *Marshall v. Stephens*, 8 Hump. 159; *Bradford v. Greenway*, 17 Ala. 797; *Short v. Battle*, 52 Ala. 456; *Doty v. Mitchell*, 9 Sm. & M. 435. "In the authorities just cited," says Mr. Bispham (Eq. 2d ed. § 103), "it was said, that there is a manifest difference between the *legal* separate estate which is due to the provisions of the statute, and the *equitable* separate estate which is the creature of courts of equity; and this view seems to be taken, also, by the courts in Illinois (*Cookeson v. Toole*, 59 Ill. 515; *Bressler v. Kent*, 61 Ill. 426; *Cole v. Van Riper*, 44 Ill. 58; *Carpenter v. Mitchell*, 50 Ill. 470; *Rogers v. Higgins*, 48 Ill. 211); and, after some fluctuation, by those in Alabama. See *Short v. Battle*, 52 Ala. 456; overruling *Molton v. Martin*, 43 Ala. 651; *Glenn v. Glenn*, 47

Ala. 204, and *Denechand v. Berry*, 48 Ala. 591; see *Lippincott v. Mitchell*, 94 U. S. 767. But a different opinion on the subject has been entertained in other states, and the general tendency of the division is, perhaps, to put estates of both kinds, so far as regards the power of the *feme* over them, upon the same footing. *Willard v. Eastham*, 15 Gray, 328; *Yale v. Dederer*, 18 N. Y. 265; *Ballin v. Dillaye*, 37 N. Y. 35; *Peake v. La Bau*, 6 C. E. Green, 282. The South Carolina rule was, however, adopted in Rhode Island (*Metcalf v. Cook*, 2 R. I. 355); Tennessee (*Marshall v. Stephens*, 8 Hump. 159; see, however, *Young v. Young*, 7 Cold. 461); Mississippi (*Doty v. Mitchell*, 9 Sm. & M. 435); Illinois (*Swift v. Castle*, 23 Ill. 209; *Bressler v. Kent*, 61 Ill. 426; overruling *Young v. Graff*, 28 Ill. 20); and formerly in Maryland (*Miller v. Williamson*, 5 Md. 219; *Tarr v. Williams*, 4 Md. Ch. 68). It was also recognized, to a limited extent, in Ohio (*Machir v. Burroughs*, 14 Ohio, N. S. 519)."—That a married woman may bind herself by articles of partnership so far as concerns her separate estate, is argued by Mr. Pollock, citing *Lindley on Partnership*, 1, 86. That she may thus be a partner of her own husband, see *Kinhead in re*, 3 Biss. 405.

<sup>3</sup> Bispham's Eq. § 104.

power of disposition in advance; and creditors are restricted to dividends and profits already accrued.<sup>1</sup> And the restraint against alienation protects even against liability for fraudulent acts.<sup>2</sup>—A gift to the separate use of a married woman now gives her, in England, the same power of alienation as she would have if she were single.<sup>3</sup>

§ 77 a. When a married woman contracts for remuneration for her own services, she is, as is said, the meritorious cause of action, and she may sue on the contract, the coverture being no defence on the merits, though in some jurisdictions it may be necessary on technical grounds to join the husband in the suit.<sup>4</sup>

May contract for services, but not for goods or money.

It is also “settled law that a married woman, though incapable of making a contract, is capable of having a *chose in action* conferred upon her, which will survive to her on the death of her husband, unless he shall have interfered by doing some act to reduce it into possession.”<sup>5</sup> And while a married woman cannot, at common law, sue for the value of goods supplied by her, or for money lent by her, all chattels in her possession being the personal property of her husband,<sup>6</sup> she may sue for money received by a third party to her use, which money has not been reduced in her husband’s possession.<sup>7</sup> But reduction into possession by the husband divests her of her interest. Thus, even where the husband opens an account with a banker in his wife’s name, the money deposited remains his property.<sup>8</sup> And when an account is opened by the husband in his own and his wife’s names, with authority to the wife to draw, the balance on his death remains his property.<sup>9</sup>

<sup>1</sup> Butler v. Cumpston, L. R. 7 Eq. 16; M. & W. 97; Guyard v. Sutton, 3 C. B. Roberts v. Watkins, 46 L. J. Q. B. 552; 153. Leake, 2d ed. 557.

<sup>5</sup> Per cur. in Dalton v. R. R., 13 C. B. 474.

<sup>2</sup> Arnold v. Woodhams, L. R. 16 Eq. 29; Thomas v. Price, 46 L. J. C. 761; Stanley v. Stanley, L. R. 7 C. D. 589.

<sup>6</sup> King v. Basingham, 8 Mod. 199; Bird v. Peagram, 13 C. B. 639.

<sup>3</sup> Jessel, M. R., Cooper v. Macdonald, L. R. 7 Ch. D. 293.

<sup>7</sup> Fleet v. Perrine, L. R. 4 Q. B. 500; Jones v. Cuthbertson, L. R. 8 Q. B. 504.

<sup>4</sup> Leake, 2d ed. 560; Weller v. Baker, 2 Wils. 423; Bendix v. Wakeman, 12

<sup>8</sup> Lloyd v. Pughe, L. R. 8 Ch. 88.

<sup>9</sup> Marshal v. Crutwell, L. R. 20 Eq. 328.

§ 78. It has been argued, that if a married woman make an engagement expressly in reference to a separate estate hereafter to be acquired, this engagement binds such estate, at least by estoppel; and if she is capable of binding her separate estate, by engagement, to be enforced in equity, it is also argued that she cannot be denied this capacity in reference to an estate to which she is entitled, but on which she has not yet entered.<sup>1</sup> But the better view is that she cannot, by mere estoppel, unless there be fraud, convey that which she could not pass by deed.<sup>2</sup> And it is now settled by the court of appeal in England, that a married woman's covenant, purporting to bind any separate estate to which she was entitled at the time, does not bind after-acquired separate estate; and a judgment on such covenant binds only so much of the separate estate to which she was entitled at the date of the covenant, as is in existence belonging to her at the date of the judgment.<sup>3</sup>

Married women cannot bind future acquired estate.

§ 79. Both in England and in the United States, statutes have been adopted by which the common law restriction just stated has been more or less removed.<sup>4</sup> The statutes in force in this relation are too numerous, too various, and too transitory, to be subjected

By statute disability has been much qualified.

<sup>1</sup> This position is taken by Mr. Pollock in his first edition; Wald's Pollock, 70, citing Lush's Trusts, L. R. 4 Ch. 591; Read v. Hall, 57 N. H. 482; Bodine v. Kileen, 53 N. Y. 93; Nash v. Mitchell, 71 N. Y. 199; Fallis v. Keys, 35 Oh. St. 265; Norton v. Nichols, 35 Mich. 148; Scranton v. Stewart, 52 Ind. 68; Nixon v. Halley, 78 Ill. 611; Patterson v. Lawrence, 90 Ill. 174. In Mr. Pollock's third edition this position is abandoned, in submission to Pike v. Fitzgibbon, L. R. 17 Ch. D. 454.

<sup>2</sup> Merrian v. R. R., 117 Mass. 241; Jackson v. Van Derkuyden, 17 Johns. 167; Carpenter v. Schemerhorn, 3 Barb. Ch. 314; Teal v. Woodworth, 3 Paige, 470; Gledden v. Strupler, 52 Penn. St. 400; Oglesby v. Pasco, 79 Ill. 164; see as to estoppel, *infra*, § 89.

<sup>3</sup> Pike v. Fitzgibbon, L. R. 17 Ch. D. 454 (James, Brett, and Colton, L. JJ., reversing S. C., L. R. 14 Ch. D. 837, and overruling Flower v. Buller, L. R. 15 Ch. D. 665); see Schouler, Husband and Wife, § 202. When a woman contracts debts before marriage, these debts, during marriage, cannot be enforced against her separate estate. Vanderheyden v. Mallory, 1 Comst. 452.

<sup>4</sup> An article by Mr. Westlake, on English legislation in this relation, will be found in the *Revue de droit int.* 1871, p. 195. The Pennsylvania rulings are given in Husband's Married Women, §§ 44-46. An analysis of American legislation on this topic will be found in Tyler on Inf. and Cov. 2d ed. 1882.

to classification in this place. In some states modifications have been made annually for a series of years; and the task, as we are told by an able and experienced critic,<sup>1</sup> "would involve the collation of two or three hundred separate enactments, in nearly forty different states, during a period of thirty years or more, and which have been discussed in perhaps a thousand or two of decided cases." "The chief embarrassment," it is added, "of any attempt to state accurately or completely the existing law on this subject, would be found in the fact that while these statutes are destroying piecemeal the ancient common-law system of marital property rights, expounded and eulogized by Blackstone, it has not been replaced, even in states where not a vestige of the common law on this subject remains, by a new system, symmetrical, consistent, or complete." So far, however, as concerns the topic immediately before us, we may say that in most states married women are now made capable of suing and being sued on contracts made by them personally. And as a matter of private international law, we may hold that a married woman incapable of contracting by her personal law, may make a valid contract in a state imposing no such disability.<sup>2</sup>—When

<sup>1</sup> Mr. Hitchcock, in 6 South. Law Rev. 635 (Jan. 1881).

<sup>2</sup> See Whart. Conf. of Laws, 2d ed. § 118. A valuable summary of recent statutes on this topic will be found in an appendix to Schouler on Husb. and Wife, 1882. Mr. Hitchcock, in the article above cited, says: "In general these statutes permit married women to make contracts independently of the husband. But here, again, discrepancies appear; some statutes permitting her the largest liberty, including the power to form business partnerships and to contract directly with her husband, while others permit her to contract with third persons in general, but not to form partnerships, and not at all with her husband. . . . As to the right to become a 'sole trader,'—that is, to carry on business on her

own account,—important differences exist in the various statutes."—In Dampf's Appeal, 10 Weekly Notes, 443, the law in Pennsylvania on this point is thus stated by Mercur, J.: "A married woman lacks capacity to convey her real estate otherwise than in the manner prescribed by the statute. (*Rumfelt v. Clemens*, 46 Penn. St. 455; *Dunham v. Wright*, 53 Penn. St. 167; *Brown v. Bennett*, 75 Penn. St. 420; *Innis v. Templeton*, Pittsburgh Legal Journal of Oct. 20, 1880, p. 73.) It is true this rule does not apply to a sale or transfer of a wife's personal estate, nor to her receipt of money. The 4th section of the act of 11th April, 1856 (*Purd. Dig.* 1009), declares, when a married woman shall be entitled to a legacy or to a distributive share of the personal estate, or of the proceeds

a woman sets up a separate estate as against her husband's creditors, the burden is on her to show that the property is really her own.<sup>1</sup>

§ 80. In England, under the divorce statute, a wife, when judicially separated from her husband, becomes, for business purposes, a *feme sole*; and "a wife deserted by her husband who has obtained a protection order, is in the same position while the desertion con-

Divorce  
creates in-  
dependent  
liability.

of the real estate of a deceased person, it shall be competent for her, either in person or by attorney, to sign, seal, and deliver a refunding bond in pursuance of the act of assembly in such case made and provided, and also to execute all such other instruments, and to perform all such other acts, as may by law be necessary to be done, or may be lawfully required by the executor or administrator upon the payment to her of the moneys to be distributed as aforesaid, with the same effect in binding her separate estate as if she was a *feme sole*. The object of this act is not to give a married woman general powers, nor the power to transact business generally, but to bind herself by such acts and instruments as may be necessary, or be lawfully required by the executors or administrators, 'upon the payment to her of the money to be distributed.' It is to protect them and give them a legal voucher for what they have actually paid to her."—That under the New York statute a married woman is personally bound on her oral engagement to pay for necessities which are sold to her on her credit, although she has no separate estate, see *Tierney v. Turnquist*, 85 N. Y. 516.

In Massachusetts a married woman may now generally by statute contract. *Major v. Holmes*, 124 Mass. 108; *Kennedy v. Sawyer*, 125 Mass. 28.

<sup>1</sup> "Even in a case where a widow

claims property as against her husband's estate, it has been held 'that she must show by evidence which does not admit of a reasonable doubt, either that she owned it at the time of her marriage, or else acquired it afterwards by gift, bequest, or purchase. In case of a purchase after marriage, the burthen is upon her to prove distinctly that she paid for it with funds which were not furnished by the husband.' (*Black. J.*, in *Gambier v. Gambier*, 18 Penn. St. 363.) Again it was said by the same learned justice in *Keeny v. Good* (21 Penn. St. 242), 'To bring the property of a married woman under the protection of the act of 1848, it is made necessary by the letter, as well as by the spirit of the statute, to prove that she *owns* it. She must identify it as property which was hers before marriage, or prove how she came by it afterwards. Evidence that she purchased it amounts to nothing unless it be accompanied by clear and full proof that she paid for it by her own separate funds. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment.' Like doctrine will be found in *Gault v. Saffin* (44 Penn. St. 307), and many other cases to which we need not revert." *Wilson v. Silkman*, 97 Penn. St. 509, and see *Horton v. Dewey*, S. C. Wis. 1881, 13 Rep. 224, and other cases cited *infra*, § 91.

tinues."<sup>1</sup> The same rule exists in France, in reference to judicial separations, not, however, amounting to divorces from the bond of matrimony. By the latter kind of divorce, it need scarcely be added, the wife's incapacities are removed in all cases of which the divorcing court has internationally jurisdiction of the cause.<sup>2</sup> And as a general rule, the wife, after divorce, is entitled to do business as a *feme sole*.<sup>3</sup> Even after a divorce from bed and board she has been held so entitled.<sup>4</sup>

§ 81. The mere fact that a woman is separated from her husband, living apart from him by agreement, can no more, at common law, confer on her business capacity, than could at common law an agreement between a parent and an infant confer business capacity on the infant.<sup>5</sup> That she lives and trades as it *sui juris* does not make her *sui juris*.<sup>6</sup> But absolute desertion by the husband, compelling her to take an independent position, and to do business for her own support, may enable her to acquire an independent domicil for divorce purposes, and to sue and be sued.<sup>7</sup>

§ 82. The contracts executed by a married woman before her marriage, bind, at common law, her husband, and enure

<sup>1</sup> Pollock on Cont. 3d ed. 83; see Wait v. Wait, 28 Vt. 550; Hunt v. Schouler, Husb. and Wife, §§ 558 et seq.

<sup>2</sup> Whart. Con. of Laws, §§ 216 et seq. Wells v. Malbon, 31 Beav. 48; Wilkinson v. Gibson, L. R. 4 Eq. 162. As to effect of divorce on marriage settlement, see Fitzgerald v. Chapman, L. R. 1 Ch. D. 563; Burton v. Sturgeon, L. R. 2 Ch. D. 318. But divorce has no retroactive effect in making actionable claims not actionable during coverture in which period they arose. Phillips v. Barnett, L. R. 1 Q. B. D. 436, and see Wells v. Malbon, 31 Beav. 48; Fitzgerald v. Chapman, L. R. 1 Ch. D. 563.

<sup>3</sup> Tyler on Infancy, etc. 2d ed. § 354; Schouler, Husb. and Wife, § 559; see

Wait v. Wait, 28 Vt. 550; Hunt v. Thompson, 62 Mo. 148.

<sup>4</sup> Pierce v. Burnham, 4 Met. (Mass.) 303; Dean v. Richmond, 5 Pick. 461; Benadum v. Pratt, 1 Oh. St. 403; though see Burr v. Burr, 10 Paige, 166; Clark v. Clark, 6 W. & S. 85.

<sup>5</sup> Marshall v. Rutton, 8 T. R. 545.

<sup>6</sup> Clayton v. Adams, 6 T. R. 605; Hayward v. Barker, 52 Vt. 429; Concord Bank v. Bellis, 10 Cush. 276; Keen v. Coleman, 39 Penn. St. 299.

<sup>7</sup> Wh. Con. of Laws, § 224; Rhea v. Renner, 1 Pet. 195; Ayer v. Warren, 47 Me. 230; Abbot v. Bayley, 6 Pick. 89; Gregory v. Pierce, 4 Metc. Mass. 31, 478; Ames v. Chew, 5 Metc. Mass. 320; Rosenthal v. Mayhugh, 33 Oh. St. 155; Blumenberg v. Adams, 49 Cal. 308. See *supra*, § 76.

to his benefit, should he execute them and reduce their proceeds into his possession. If, however, this reduction does not take place, they survive to her, after his death.<sup>1</sup> A new contract, or novation, or merger by judgment, is a reduction into possession. It is otherwise, however, as to receipt of interest, or joining with the wife in receipt of principal.<sup>2</sup>

Her contracts before marriage pass to her husband.

§ 83. A husband is liable for his wife's torts,<sup>3</sup> though it is otherwise as to torts based on contracts, and deceits, and false pretences.<sup>4</sup> Suits for redress for injuries of this class, committed by a married woman, cannot be brought against her husband.<sup>5</sup> And where a wife is *sui juris*, her husband is not liable for her torts in matters as to which she acts independently.<sup>6</sup>

Husband liable for her torts.

§ 84. A married woman, though incompetent to contract on her own account, may bind her husband by contracts made by her for ordinary household expenses. The family relation, as shaped by society, places in the wife's hands the management of household affairs.<sup>7</sup> But the agency is limited to household matters, unless otherwise implied from the prior procedure of the parties;<sup>8</sup> though whatever is necessary for the support of the family,

Wife may bind husband as agent.

<sup>1</sup> 1 Parsons on Cont. p. 341; Morris v. Norfolk, 1 Taunt. 212; Co. Lit. 351, b. c.; Dodgson v. Bell, 5 Exch. 967.

<sup>2</sup> 1 Parsons on Cont. p. 342; Hart v. Stephens, 6 Q. B. 937; Morse v. Earl, 13 Wend. 271; Timbers v. Katz, 6 W. & S. 290. As to novation see *infra*, §§ 852 *et seq.*

<sup>3</sup> Hawk v. Harman, 5 Binn. 43.

<sup>4</sup> Tyler on Inf. etc. 2d ed. § 233.

<sup>5</sup> Liverpool Assoc. v. Fairhurst, 9 Exch. 422; Keen v. Hartman, 48 Penn. St. 497.

<sup>6</sup> Hill v. Duncan, 110 Mass. 238; Peake v. Leman, 1 Lans. 295; Baum v. Mullen, 47 N. Y. 577; Fiske v. Bailey, 51 N. Y. 150; Burt v. McBain, 29 Mich. 260; though see Fowler v. Chester, 26 Oh. St. 9.

<sup>7</sup> Emerson v. Blonden, 1 Esp. 142; Meredith v. Footner, 11 M. & W. 202;

Pickering v. Pickering, 6 N. H. 124; Felker v. Emerson, 16 Vt. 653; MacKinley v. McGregor, 3 Whart. 369; Murphy v. Hubert, 16 Penn. St. 50. In Seaton v. Benedict (5 Bing. 28; 2 Sim. L. C., 7th Eng. ed. 475), Best, C. J., says: "A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessities, he makes her impliedly his agent to purchase them."

<sup>8</sup> Cobbett v. Hudson, 15 Q. B. 988; Lane v. McKeen, 15 Me. 304; Green v. Sperry, 16 Vt. 390; Benjamin v. Benjamin, 15 Conn. 347; Debraham v. Walker, 3 Weekly Notes, 26. See as to inferring agency in drawing negotiable paper, Barlow v. Bishop, 1 East, 432; Lindus v. Bradwell, 5 C. B. 582; Minard v. Mead, 7 Wend. 68; Leeds v.

keeping its social condition in view, may be furnished on this basis,<sup>1</sup> the employment of servants being included in this category.<sup>2</sup> The principle is not affected by the statutes giving independent status to married women.<sup>3</sup> The tradesman is not bound to inquire as to the husband's circumstances or the wife's necessities.<sup>4</sup> Independently of this implied agency, she may bind her husband by doing business on his behalf with his authority, and when it appears that such an agency was assented to by the husband (and for this purpose proof of acquiescence is enough), there is nothing, at common law, which precludes her from binding her husband.<sup>5</sup> That her husband lives with her when she is carrying on trade, and joins with her in enjoying the profits, constitutes him principal in the trade, liable for her acts.<sup>6</sup> But unless there be

Vail, 15 Penn. St. 185. See Schouler, Husb. and Wife. §§ 100 *et seq.*

<sup>1</sup> Breinig v. Meitzler, 23 Penn. St. 156; *infra*, § 92.

<sup>2</sup> Powers v. Russell, 26 Mich. 179.

<sup>3</sup> Weir v. Groat, 4 Hun, 193; Flynn v. Messenger, Min. Sup. Ct. 9 N. W. Rep. 759, where it is said: "The principle laid down in Powers v. Russell, 26 Mich. 179, in the following language: 'Now, if he (the tradesman) knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account, and for the use of his family; and she could not be made individually liable without an express agreement to become so, or that the goods should be charged or the credit given to herself.'" "If it was intended to make so important a change in the law and the usages of society, it is to be presumed that the legislature would have declared it in express

terms, and not left it to be brought about by implication from other provisions not directed to the rules of evidence connected with the marital relation, or the presumption of the common law arising therefrom. These principles apply with equal force to the employment by the wife of servants for ordinary domestic service in and for the benefit of the husband's family, and dispose of this case." "We also think it is to be assumed, *prima facie* at least, in the absence of anything in the proceedings or proofs to the contrary, on grounds of common knowledge, that the service performed by the plaintiff was an ordinary domestic service, such as the wife might reasonably employ for the benefit of the family."

<sup>4</sup> Eames v. Sweetser, 101 Mass. 78. See *infra*, § 92.

<sup>5</sup> Wh. on Agency, § 15; Church v. Landas, 10 Wend. 79.

<sup>6</sup> Clifford v. Burton, 1 Bing. 199; MacKinley v. McGregor, 3 Whart. 369; Abbott v. Mackinley, 2 Miles, 220. So far as concerns her purchase of goods for household use is concerned, his knowledge of her purchase, without



such agency, express or implied, shown, the husband is not bound either by his wife's independent business engagements, or by her purchases of articles not necessary for the support of the household in accordance with the station of the parties.<sup>1</sup> And should it appear that the wife has a separate income, and that articles in the same line supplied to her (not for joint household use) were previously charged to her separate account by the same tradesman, this will preclude his recovery from the husband.<sup>2</sup>—It is now settled in England that a husband who is able and willing to supply his wife with necessaries, and has forbidden her to pledge his credit, is not liable, though living with his wife, for necessaries furnished the wife by a tradesman ignorant of the husband's prohibition.<sup>3</sup> So far as concerns articles not of immediate necessity,

protesting, is an acquiescence. 1 Parsons on Cont. 348, citing *Waithman v. Wakefield*, 1 Camp. 120.

<sup>1</sup> *Reneaux v. Teakle*, 8 Exch. 680; *Montague v. Benedict*, 3 B. & C. 637; *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Jolly v. Rees*, 15 C. B. N. S. 628.

<sup>2</sup> *Bentley v. Griffin*, 5 Taunt. 356; *Shelden v. Pendleton*, 18 Conn. 417.

<sup>3</sup> *Debenham v. Mellon*, L. R. 5 Q. B. D. 394; 42 L. T. (N. S.) 577; aff. in House of Lords, 43 L. T. (N. S.) 673; L. R. 6 Ap. Ca. 24. In the House of Lords, Lord Blackburn said: "I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the

majority of the court in *Jolly v. Rees*, *ubi supra*, and also by the judges in the court of appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions, by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule; but where an agent is clothed with an authority, and afterwards that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, 'The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist.' Now, there may be many cases in which the husband has

a prohibition by the husband, notice of which is brought home to the creditor, will in any view relieve the husband from liability.<sup>1</sup> But no notice of non-liability will divest the husband of the duty incumbent on him to give his wife, when she is dependant on him, and when he has the means, the necessities of life.<sup>2</sup> And it is also agreed on all sides, that, when the articles furnished are not necessities in the sense of being needed to support life, though suitable, as articles of dress, to the wife's station, a tradesman supplying the wife with goods does so at his own risk, and cannot recover if it appear that the wife has an adequate allowance from the husband, and is forbidden to buy goods on his credit, though the husband and wife continue to live together, and it is not proved that the tradesman had notice of the prohibition.<sup>3</sup>—A wife's action, as her husband's agent, in excess of her authority, may impose liability on him if subsequently ratified by him.<sup>4</sup>

Husband  
may be  
wife's  
agent.

§ 85. Whenever the wife is competent to act, she may appoint her husband as agent; and as agent he may manage her separate estate.<sup>5</sup> The question is

so sanctioned his wife's pledging his credit, but there is not any such case here."—The ruling of the majority of the court in *Jolly v. Rees*, 15 C. B. N. S. 628, was by this affirmed. See discussion in *London Law Times*, Nov. 6, 1880, 3; Oct. 15, 1881, 382; Feb. 11, 1882. In the last cited paper we have the following: "Baron Huddleston and a common jury were engaged a few days ago determining some questions with reference to that liability in *O'Kell v. Elderton*. The plaintiff, a butcher, had supplied the defendant's wife with goods to the amount of over a hundred pounds, of which sum about seventy pounds remained unpaid. The defendant was quartered in India, and his wife lived in England, for the most part, with her mother, at the periods when the goods in question were supplied. She had an allowance from the defendant. The separation was for a meritorious cause, and not by reason

of any misconduct. The plaintiff admitted that the bills were made out to the wife, and that he never made any inquiries as to her authority. The learned judge nonsuited the plaintiff; nor is there any doubt that the authorities fully bear out the view on which he acted."

<sup>1</sup> *Reneaux v. Teakle*, 8 Exch. 680.

<sup>2</sup> *Infra*, § 92.

<sup>3</sup> *Ibid.*; *Reneaux v. Teakle*, *ut supra*; *Phillipson v. Hayter*, L. R. 6 C. P. 35.

<sup>4</sup> *Montague v. Benedict*, 3 B. & C. 631; *Seaton v. Benedict*, 5 Bing. 58; *Prestwick v. Marshall*, 7 Bing. 565; *Millard v. Harvey*, 34 Beav. 237.

<sup>5</sup> *Wh. on Agency*, § 11; *Reed v. Earle*, 12 Gray, 423; *Buckley v. Wells*, 33 N. Y. 518; *Rowell v. Klein*, 44 Ind. 291; *Cubberly v. Scott*, 98 Ill. 38; *Bennett v. Stout*, 98 Ill. 47; *McLaren v. Hall*, 26 Iowa, 297; *Ready v. Bragg*, 1 Head (Tenn.), 511.

one of fact to be determined on all the circumstances of the case.<sup>1</sup>

§ 86. As has been already incidentally seen, a husband, when he is able, is bound to support his wife, she depending on him for this support.<sup>2</sup> He does not relieve himself of this duty by deserting her; and no matter how absolute may be his repudiation of her, he is liable, if he does not duly support her, for necessities furnished by third parties for her support.<sup>3</sup> The same rule is maintained in cases where the husband drives the wife from their house by his cruelty.<sup>4</sup> She is entitled, under such circumstances, to procure, on her husband's credit, articles proper to the situation in life in which her marriage placed her.<sup>5</sup> Nor is it necessary that she should have been driven from the house by physical violence from him. It is enough if her position is made morally intolerable by him.<sup>6</sup>—In England, where a woman has been wrongfully deserted by her husband, money advanced to her when necessary for her actual support can be recovered from him in equity,<sup>7</sup> and the same view has been taken in Connecticut.<sup>8</sup>—Notice on the husband's

Husband cannot divest himself of his duty by his own wrong

<sup>1</sup> *Arnold v. Spurr*, 130 Mass. 347; see *Schouler, Husb. and Wife*, §§ 277 *et seq.*

<sup>2</sup> See also *Wh. Cr. L.* 8th ed. §§ 321, 1563.

<sup>3</sup> *Emmett v. Norton*, 8 C. & P. 506; *Honliston v. Smyth*, 3 Bing. 127; *Allen v. Aldrich*, 9 Foster, N. H. 63.

<sup>4</sup> *Rawlyns v. Vandyke*, 3 Esp. 250; *Houlston v. Smyth*, 3 Bing. 127; *Brown v. Ackroyd*, 5 E. & B. 819; *Hancock v. Merrick*, 10 Cush. 41; *Reynolds v. Sweetzer*, 15 Gray, 78; *Blowers v. Sturtevant*, 4 Denio, 46; *Breinig v. Meitzler*, 23 Penn. St. 156; *Hultz v. Gibbs*, 66 Penn. St. 360.

<sup>5</sup> *Mayhew v. Thayer*, 8 Gray, 172; see *Hunt v. De Blaquiére*, 5 Bing. 550; *Montague v. Benedict*, 3 B. & C. 635.

<sup>6</sup> *Baker v. Sampson*, 14 C. B. (N. S.) 383.

<sup>7</sup> *Deare v. Soutten*, L. R. 9 Eq. 151.

<sup>8</sup> *Kenyon v. Farris*, 47 Conn. 510, reported in *Cent. L. J.* 1881, p. 304, where will be found a valuable article by Mr. L. T. Michener giving the English cases. From the opinion of Pardee, J., in *Kenyon v. Farris*, the following is extracted:—

“In *Harris v. Lee*, 1 P. Wms. 482, the petitioner had loaned £30 to the respondent's wife, who had left him for cause, to enable her to pay doctors and for necessities. The court said: ‘Admitting that the wife cannot at law borrow money, though for necessities, so as to bind the husband, yet this money being applied to the use of the wife for her use and for necessities, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessities for the wife. And, therefore, as such persons could be creditors

part, either generally by publication or specially by private communication, will not relieve him from liability;<sup>1</sup> nor, on the other hand, is notice necessary to protect him when the wife has notoriously separated from him in her own wrong.<sup>2</sup>—A note given by a wife, separated from her husband, for necessities has been held to be void.<sup>3</sup>

§ 87. A husband's liability for necessities furnished to his wife living separate from him is limited to the cases in which this separation is compelled by his misconduct. And the

of the husband, so the plaintiff shall stand in their place and be a creditor also; and let the trustees pay him his money and likewise his costs.' And in *Marlow v. Pitfield*, 1 P. Wms. 559, the court said: 'If one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, here, although he may not be liable at law, he must nevertheless be so in equity.' In *Deare v. Soutten*, L. R. 9 Eq. 151 (1869), the marginal note is as follows: 'A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards her support, is entitled in equity, though not at law, to recover such sums from the husband.' In giving the decision, Lord Romilly, M. R., said: 'I am of the opinion that this is a proper suit and that the plaintiff is entitled to a decree. The cases cited on behalf of the defendant have no application, and *May v. Shey*, 16 Sim. 588, is overruled by *Jenner v. Morris*, 3 De G. F. & J. 45.' He then proceeds to quote from the latter case, and from *Walker v. Simpson*, 7 Watts & S. 83, to the same effect, and concluded as follows: 'We willingly follow the leading of these authorities, because we think that the line of separation between necessities and money loaned for the purpose of purchasing them may well

be obliterated. So far as the husband is concerned, they are practically convertible terms. His burden will not be increased if he is made liable for money; the scope of the word necessities will not thereby be broadened; the lender will be compelled to prove an actual expenditure for them; the law has discharged its duty to the husband in protecting him from liability for anything beyond them; it only discharges its duty to the wife by making it impossible for him to escape liability for these irrespective of the method by which he forces her to obtain them. If he has any preference as to that method, the law will secure it to him; if he refuses to adopt any, he is not to be heard to complain if she is permitted to elect, providing always that she is kept within the small circle of necessity. It is not certain that credit will, under all circumstances, supply necessities to the wife; at times they may not be had without money, and accidents of time, place, or distance may bring about such a state of things as that a friend may be able and willing to place money in her hands upon her husband's credit, who cannot personally attend to its disbursement.'

<sup>1</sup> *Dixon v. Hurrell*, 8 C. & P. 717; *Montague v. Benedict*, 3 B. & C. 635.

<sup>2</sup> *Infra*, § 88.

<sup>3</sup> *Hayward v. Barker*, 52 Vt. 429.

better opinion is that, to establish liability under these circumstances, the party suing the husband must make out such a case against him as would entitle her to a decree of divorce should it be sought by her. Hence, in such cases, the burden of showing the wife had cause for leaving is on the party suing the husband. And the husband may set up as a defence any provocative misconduct on the part of the wife which would entitle him to a judgment had she proceeded against him for divorce.<sup>1</sup> Adultery on the wife's part relieves the husband from the duty of her maintenance, even though the party furnishing her with the goods has no notice of the adultery;<sup>2</sup> though a verdict of adultery not followed by decree is not conclusive in a suit against the husband.<sup>3</sup> Nor is it a sufficient reply that the husband was guilty of adultery in the first place.<sup>4</sup>

But liability ceases when wife leaves without cause.

§ 88. The wife's power to bind her husband for necessaries ceases, also, when they are living in voluntary separation, she receiving from him an allowance for her support.<sup>5</sup> Notice to tradesmen that the husband will not be bound by the wife's contracts is not necessary to protect him from such tradesmen; though where particular tradesmen have been accustomed to furnish the wife with the husband's assent, the implied authority to the wife may continue, unless notice of its repudiation be given.<sup>6</sup> It has been intimated that in such suits the burden is on the husband to discharge himself by showing the provision made

And also when wife separates with allowance.

<sup>1</sup> *Mainwaring v. Leslie*, 2 C. & P. 507; *Hindley v. Westmeath*, 6 B. & C. 200; *Blades v. Free*, 9 B. & C. 167; *Hardie v. Grant*, 8 C. & P. 512; *Thorne v. Kathan*, 51 Vt. 520; *Hunter v. Boucher*, 3 Pick. 289; *McCutchen v. McGahay*, 11 Johns. 281; *Cunningham v. Irwin*, 7 S. & R. 247; *Walker v. Simpson*, 7 W. & S. 83; *Bevier v. Galloway*, 71 Ill. 517; *Schnuckle v. Bierman*, 89 Ill. 454; *Brown v. Patton*, 3 Humph. 135; *Williams v. Prince*, 3 Strobb. L. 490. But see *Rumney v. Keyes*, 7 N. H. 571.

<sup>2</sup> *R. v. Flinton*, 1 B. & Ad. 227; *Cooper v. Lloyd*, 6 C. B. N. S. 519.

<sup>3</sup> *Needham v. Bremner*, L. R. 1 C. P. 583.

<sup>4</sup> *Govier v. Hancock*, 6 T. R. 603.

<sup>5</sup> *Hodgkins v. Fletcher*, 4 Camp. 70; *Johnston v. Sumner*, 3 H. & N. 261; *Richardson v. Dubois*, L. R. 5 Q. B. 51.

<sup>6</sup> See *Mizen v. Pick*, 3 M. & W. 481; *Cunningham v. Irwin*, 7 S. & R. 247; and see *supra*, § 84.

by him for the wife is adequate.<sup>1</sup> But the more reasonable view is, that the mere fact of separation is sufficient to put persons dealing with her on inquiry how far her authority to bind her husband continues.<sup>2</sup> If, on the whole case, however, it appears that the wife's allowance is insufficient, the husband will be bound for whatever supplies may be required for her actual support.<sup>3</sup>

§ 89. The contract of a married woman, when by law invalid by reason of her coverture, cannot be validated by estoppel, so far as to make her bound by a contract by which she would not otherwise be bound. Thus a married woman's sale of real estate, otherwise invalid, will not be validated by encouragement given by her to the vendee to enter on the estate and make on it valuable and expensive improvements.<sup>4</sup> Nor is such estoppel worked by the additional fact that the married woman held herself out to be unmarried.<sup>5</sup> But if a married woman induces a purchaser to buy an estate to which she has an adverse title, she being cognizant at the time of such title but fraudulently concealing it, she will be estopped from afterwards setting up her title against him.<sup>6</sup> The condition of fraud is on principle important in all jurisdictions in which a married woman is not contractually liable; and adopting this

<sup>1</sup> *Frost v. Willis*, 13 Vt. 202. But see *Mainwaring v. Leslie*, M. & M. 18; 2 C. & P. 507; *Edwards v. Towels*, 5 M. & G. 624. Penn. St. 400; *Williams v. Baker*, 71 Penn. St. 476; *Miles v. Lingerian*, 24 Ind. 385; *Kane Co. v. Herrington*, 50 Ill. 232; *Morrison v. Wilson*, 13 Cal. 494.

<sup>2</sup> *Johnston v. Sumner*, 3 H. & N. 261; *Biffen v. Bignell*, 7 H. & N. 877; *Mott v. Comstock*, 8 Wend. 544; *Caney v. Patton*, 2 Ash. 140; *Jacobs v. Featherston*, 6 W. & S. 346; see *Hultz v. Gibbs*, 66 Penn. St. 360. <sup>5</sup> *Liverpool Ass. v. Fairhurst*, 9 Ex. 422.

<sup>3</sup> *Hodgkinson v. Fletcher*, 4 Camp. 75; *Emmett v. Norton*, 8 C. & P. 506; *Lookwood v. Thomas*, 12 Johns. 248. <sup>6</sup> *Bispham's Eq.* 2d ed. § 293, citing *McCullough v. Wilson*, 21 Penn. St. 436; *Couch v. Sutton*, 1 Grant's Cas. 114; *Brinkerhoff v. Brinkerhoff*, 8 C. E. Green, 477, 483; *Carpenter v. Carpenter*, 10 C. E. Green, 194; *Connolly v. Braustler*, 3 Bush, 702; *Drake v. Glover*, 30 Ala. 382. See *Klein v. Caldwell*, 91 Penn. St. 140. As to estoppel by infants see *supra*, § 74. As to whether estoppel can operate on future acquired property, see *supra*, § 78.

<sup>4</sup> *Bispham's Eq.* 2d ed. § 293, citing *Drury v. Foster*, 2 Wal. 24; *Rangeley v. Spring*, 21 Me. 130; *Concord Bank v. Bellis*, 10 Cush. 276; *Bemis v. Call*, 10 Allen, 512; *Merriam v. Boston R. R.*, 117 Mass. 241; *Glidden v. Strupler*, 52

distinction, Mr. Bigelow<sup>1</sup> states the law to be that "parties under disability, as infants and married women, are not estopped unless their conduct has been intentional and fraudulent."<sup>2</sup> And he goes on to say that "in cases of fraud unmixed with contract, whether by concealment or active conduct, the current of authority declares (in opposition to the doctrine in Massachusetts) that a married woman may estop herself to deny the truth of her representation."<sup>3</sup>—Whether a married woman

<sup>1</sup> Estoppel, 3d ed. 510.

<sup>2</sup> He cites Kane Co. v. Herrington, 50 Ill. 232; Schnell v. Chicago, 38 Ill. 382; Davidson v. Young, 38 Ill. 148; Rogers v. Higgins, 48 Ill. 211; Schwartz v. Saunders, 46 Ill. 18; Miles v. Lingerian, 24 Ind. 385; McCoon v. Smith, 3 Hill, 147; Schenck v. Stumpf, 6 Mo. Ap. 381.

<sup>3</sup> To this, in addition to the cases already noted, are cited, among other cases: Reed v. Hall, 57 N. H. 482; Patterson v. Lawrence, 90 Ill. 174; Anderson v. Armstead, 69 Ill. 452; Meiley v. Butler, 26 Oh. St. 535; Dukes v. Spangler, 35 Oh. St. 119; Rusk v. Fenton, 14 Bush, 490; Davis v. Zimmerman, 40 Mich. 24; Levy v. Gray, 56 Miss. 318.

It may be in view of this modified capacity of binding herself by estoppel that a married woman has been held entitled, though on questionable reasoning, after part payment of the purchase money of land bought by her, to enforce performance of the contract. Neef v. Redmon, S. C. Mo. 1881. The court said: "This is a case of the first impression in this court, and there is a lamentable dearth of authority on the question involved. 'As a general rule a married woman cannot, except in special cases, contract as a *feme sole*, nor as such sue or be sued.' Cord on Married Women, § 532. 'Any form of contract which she may make is as to her a nullity.' 1 Bishop on Married

Women, § 39. But it by no means follows that one cannot bind himself by a contract with her. She cannot bind herself personally by any contract she may make. It is not like most contracts of an infant, voidable only, but while it remains wholly unexecuted on her part is absolutely void. Not binding her, it cannot be enforced against the party contracting with her. The element of reciprocity or mutuality is absent. A contract executed by her in whole or in part, and remaining executory on the part of the person contracting with her, occupies a different footing. If she has executed her part of the contract, he cannot say there is no consideration for his agreement. 'If she has done all on her part required by the contract, it will be enforced against the other party;' and it makes no difference that she could not have been compelled to perform the agreement. 2 Bishop on Married Women, § 250. 'But if the agreement rests merely in mutual promises, then, in principle, as the promise of the married woman is a nullity, it cannot constitute a consideration for the promise of the other party, and, therefore, it is void as to him.' Ibid. Conceding that he might rescind the contract by tendering to her what he had received, in part performance of the contract on her part, shall he retain what he has thus received, and

is estopped by her covenant of warranty, or by recitals, is a question as to which there is much conflict of opinion. The preponderating view is that she cannot be so estopped in jurisdictions where she has no business capacity;<sup>1</sup> though this is not without strong dissent and occasional departures from the rule even in states where it is nominally recognized.<sup>2</sup> Under recent statutes conferring capacity on married women, estop-

refuse to perform his contract, on an offer by her to complete the performance on her part?

"It is not the case of a mere payment of money on a verbal contract and an attempt to enforce specific performance, because there has been a part performance of the contract. Here is a contract in writing, signed by the party to be charged, and while the contract as to the other party is a nullity, as long as it is entirely executory on her part, and, therefore, not binding on him, it ceases to be a nullity as to him when she has executed her agreement either in whole or in part. If after having received a part of what she was to give, he may still rescind the contract, because he cannot compel the performance of the balance of her contract, equity will not let him do so without returning or offering to return what he may have received from her in part performance; but will regard the contract as possessing sufficient vitality, as against him, to enable her to get what she bargained for unless he will place her *in statu quo* by returning what he has received from her. The principle which exonerates her from personal liability on any contract she may make, is a shield for the protection of herself and husband, and is not to be used as a weapon for their destruction.

"In *Chamberlain v. Robertson*, 31 Iowa, 410, somewhat similar to the case at bar, there was a purchase by a mar-

ried woman of a tract of land and part payment of the purchase-money. The defendant refused to convey to her on the ground that she was a married woman, and as the contract could not have been enforced against her, neither could it be enforced against him. In delivering the opinion of the court, Beck, J., observed: 'Admitting that the contract, if it had not been performed or partly performed by plaintiff, could not have been enforced against her, it does not follow that defendant for that reason would be relieved from its obligation.' " But notwithstanding the conclusion thus stated, we must hold that if the contract was void as to the one party, it was void as to the other. *Supra*, § 2.

<sup>1</sup> *Bank of America v. Banks*, 101 U. S. 240; *Lowell v. Daniels*, 2 Gray, 161, overruling *Fowler v. Shearer*, 7 Mass. 21; *Merriam v. R. R.*, 117 Mass. 241; *Jackson v. Vanderheyden*, 17 Johns. 167; *Sparrow v. Kingman*, 1 Const. 242; *Wallace v. Miner*, 6 Ohio, 364; *Straun v. Straun*, 50 Ill. 33; *Patterson v. Lawrence*, 90 Ill. 174, 612; *Barker v. Circle*, 60 Mo. 258; *Gonzales v. Hukil*, 49 Ala. 260; and cases cited Big. on Est. 3d ed. 277.

<sup>2</sup> *Dukes v. Spangler*, 35 Oh. St. 119; *Hill v. West*, 8 Ohio, 222; *Massie v. Sebastian*, 4 Bibb, 433; *Strong v. Waddell*, 56 Ala. 471; *King v. Rea*, 56 Ind. 1. As to parallel cases of estoppel by infants, see *supra*, § 74.



pels operate wherever there is capacity to contract.<sup>1</sup> This is the rule in England,<sup>2</sup> and has been extended to cases of contract in several adjudications in this country.<sup>3</sup> And even though the capacity to be bound by an estoppel *in pais* is not conferred by an enabling act, it may be asserted that, if the capacity to be bound directly is given, that to be bound indirectly follows.<sup>4</sup>

§ 90. A contract for the future separation of husband and wife, being against the policy of the law, is invalid.<sup>5</sup> It is otherwise as to agreements for immediate separation, which, when there is sufficient consideration, and when the provisions are fair and equitable, will, according to the opinion now prevalent, be sustained.<sup>6</sup> And a husband will be enjoined from molesting his wife in contravention of provisions of articles of separation;<sup>7</sup> and may be enjoined from suing for restitution of conjugal rights, in violation of a deed of separation.<sup>8</sup>

Contracts for future separation invalid.

§ 91. In both law and equity, agreements between husband and wife are void, so far as concerns the marital estate, they being in this respect regarded as one person.<sup>9</sup> But a contract between husband

Agreements between husband and wife void.

<sup>1</sup> Knight v. Thayer, 125 Mass. 25.

<sup>2</sup> Lush in re, L. R. 4 Ch. Ap. 591; Vaughan v. Vanderstegen, 2 Drew. 363.

<sup>3</sup> See Patterson v. Lawrence and other cases cited *supra*.

<sup>4</sup> Bigelow, *ut supra*, 513.

<sup>5</sup> *Infra*, § 395; Westmeath v. Westmeath, 1 Dow. & C. 519; Bispham's Eq. § 115, citing Stapilton v. Stapilton, 2 Lead. Cas. Eq. 855.

<sup>6</sup> *Infra*, § 395; Wilson v. Wilson, 1 H. L. Cas. 538; 5 H. L. Cas. 40; Gibbs v. Harding, L. R. 5 Ch. 336; Charlesworth v. Holt, L. R. 9 Ex. 38; Fox v. Davis, 113 Mass. 255; Beech v. Beech, 2 Hill, 260; Griffin v. Banks, 37 N. Y. 623; Hitner's Appeal, 54 Penn. St. 117; Thomas v. Brown, 10 Oh. St. 250; Switzer v. Switzer, 26 Grat. 574; Dutton v. Dutton, 30 Ind. 455. But for

cases in which specific performance of separation agreements has been refused, see Rogers v. Rogers, 4 Paige, 518; Champlin v. Champlin, 1 Hoff. Ch. 55; Simpson v. Simpson, 4 Dana, 140; McCrocklin v. McCrocklin, 2 B. Mon. 370; Carter v. Carter, 14 Sm. & M. 59; Collins v. Collins, Phill. Eq. 153; Hill on Trustees, 669 (4th Am. ed.), cited Bispham's Eq. § 115.

<sup>7</sup> Saunders v. Rodway, 16 Beav. 207.

<sup>8</sup> Wilson v. Wilson, 1 H. L. C. 538; Williams v. Bailey, L. R. 2 Eq. 731; Leake, 2d ed. 567.

<sup>9</sup> So by statute in Alabama, Haynie v. Miller, 61 Ala. 62. *Aliter* in Illinois, Hamilton v. Hamilton, 89 Ill. 349. That a note by a husband to his wife to induce her to return to him is void, see Copeland v. Boaz, 9 Baxt. 223; *contra*, Phillips v. Meyers, 82 Ill. 67.

and wife with regard to the wife's separate property is valid, even as regards subsequent purchasers without notice.<sup>1</sup> And in all matters relating to present separation, such contracts, as has been seen, may be valid. But in England contracts as to property between husband and wife should be through the intervention of a trustee.<sup>2</sup>—A voluntary settlement by a husband on his wife is not invalid when not interfering with the rights of creditors; and the common law rule requiring the intervention of a trustee no longer holds in this country.<sup>3</sup> It is otherwise when the rights of creditors intervene.<sup>4</sup> The

<sup>1</sup> *Teasdale v. Braithwaite*, L. R. 4 Ch. D. 85; *Kelly v. Case*, 18 Hun, 472. See *Hall v. Hall*, 52 Tex. 294, where it was held that a note executed by husband to wife for the separate moneys of the wife lent to the husband is valid.

<sup>2</sup> *Gibbs v. Harding*, L. R. 5 Ch. 336.

<sup>3</sup> *Jones v. Clifton*, 101 U. S. 225; *Linker v. Linker*, 32 N. J. Eq. 174; *Fowler v. Butterly*, 78 N. Y. 68; *Majors v. Everton*, 89 Ill. 56; *Horder v. Horder*, 23 Kan. 391; *Helmetag v. Frank*, 61 Ala. 67; *Myers v. James*, 2 Lea, 159; see *Cahill v. Marten*, 7 L. R. Ir. 361; *infra*, §§ 376, 497.

In *Sanders v. Miller*, Court of App. Ky. 1881, the evidence was that the parties to an intended marriage entered in Feb. 1878 into the following agreement: An article of agreement entered into between J. B. Sanders of the first part and Orra A. Davis of the second part. The said J. B. Sanders agrees to give Orra A. Davis (provided she marries him) as good a house, to have and to hold forever, as her sister, Helen M. Stout, had, or a sum of money equivalent to the same, five thousand dollars; —and were shortly married. Sanders sold his land in July, 1878, having obtained his wife's relinquishment of her contingent right of dower by executing and delivering to her a paper reciting

the substance and purpose of the ante-nuptial contract, and agreeing to pay to her \$5000 as soon as he should collect "the money" for the sale.

Hargis, J., in delivering the opinion of the court (the issue being the validity of this settlement), said: "While contracts made between husband and wife as a general rule are void, still, if a husband voluntarily enter into a contract to make, or he does make, a settlement upon his wife in discharge of an obligation arising out of the reception of her property, under an agreement made before its receipt or reduction to possession, such as the chancellor would on her application make upon her, neither the contract nor the settlement would be regarded as fraudulent against creditors. And with much greater reason it can be said that such a contract is possessed of vital force when preceded by a *bona fide* ante-nuptial contract, and supported by a valuable consideration (relinquishment of dower), moving from her to him at the instant of its execution. *Latimer v. Glenn*, 2 Bush, 535; *Campbell v. Campbell's Trustee*, MS. Op. 1881; *Miller v. Edwards*, 7 Bush, 397; *Lyne v. Bank*, 5 J. J. Marsh. 550."

<sup>4</sup> *Infra*, § 376; *Clark v. Rosencrans*, 31 N. J. Eq. 665.

burden is on the wife, when setting up a conveyance from the husband as against creditors, to show the fairness of the transaction.<sup>1</sup> Gross inadequacy of consideration in such cases is an index of fraud.<sup>2</sup> A projected marriage, it should be added, is a sufficient consideration, and a settlement based on such a consideration holds unless there be a conspiracy between the parties to cheat creditors.<sup>3</sup>—Post-nuptial settlements between husband and wife, when founded on a sufficient consideration, will be sustained in equity between themselves when executed in whole or in part.<sup>4</sup> But, even under the enabling statutes, settlements by a wife on her husband will be closely scrutinized, and unless they were her voluntary act, and not unduly

<sup>1</sup> *Wilson v. Silkman*, cited *supra*, § 79.

In *Fisher v. Shelver*, Sup. Ct. of Wis. Nov. 1881, the question is thus discussed by Orton, J. :—

“It is said by Mr. Justice Taylor, in *Horton v. Dewey*: ‘This court has repeatedly held, in a contest between the creditors of a husband and the wife, if the wife claims ownership of the property by a purchase, the burden of the proof is upon her to prove, by clear and satisfactory evidence, such purchase, and that the purchase was for a valuable consideration paid by her out of her separate estate, or some other person for her;’ citing *Stanton v. Kirsch*, 6 Wis. 338; *Horneffer v. Duress*, 13 Ib. 603; *Weymouth v. R. Co.*, 17 Ib. 550; *Duress v. Horneffer*, 15 Ib. 195; *Beard v. Dedolph*, 29 Ib. 136; *Stimson v. White*, 20 Ib. 562; *Elliott v. Bently*, 17 Ib. 591; *Putnam v. Bicknell*, 18 Ib. 333; *Hannan v. Oxley*, 23 Ib. 519; *Fenelon v. Hogoboom*, 31 Ib. 172; *Hoxie v. Price*, Ib. 82; *Carpenter v. Tatro*, 36 Ib. 297. And it is further said in that opinion: ‘In all such cases the burden of proof showing the *bona fides* of the purchase is upon her, and she must show by

clear and satisfactory evidence that the purchase was made in good faith, with her separate estate, or for a consideration moving from some person other than her husband. . . . The evidence in this case certainly does not fulfil the requirements of the above rules, but, perhaps, the preponderance of the evidence against the verdict is not so clear as to justify the court in reversing the judgment solely on that ground. . . . Considering the weakness of the plaintiff’s case, on the evidence, we cannot but think that several of the instructions of the court bore much too strongly in her favor, and tended to supply a want of testimony, and, in application to the facts of the case, were erroneous in law, and were calculated to mislead, and probably did mislead, the jury to the prejudice of the appellant.”

<sup>2</sup> *Infra*, § 518.

<sup>3</sup> *Infra*, § 537.

<sup>4</sup> *Kesner v. U. S.*, 98 U. S. 50; *Grain v. Shipman*, 45 Conn. 572; *Crooks v. Crooks*, 34 N. J. Eq. 610; *Bedell’s App.*, 87 Penn. St. 570; *Fargo v. Goodspeed*, 87 Ill. 290; *Darnly v. Darnly*, 14 Bush, 485.

influenced by him, will be set aside.<sup>1</sup>—The statutes enabling married women to hold separate estates, while they permit married women to receive gifts from their husbands, impart to such gifts no quality that would make them good against creditors when without consideration. The burden is in such cases on the wife to show consideration.<sup>2</sup> Nor does the fact that a judgment is entered to secure an alleged debt from husband to wife make the case any stronger for the wife.<sup>3</sup>

§ 92. It has been already seen<sup>4</sup> that a husband is liable for necessities furnished the wife. Under the head of necessities are to be included such reasonable supplies of dress and ornament as are suited to the station of the family.<sup>5</sup> Maintenance of children, when left to the wife's care, falls under this head;<sup>6</sup> and such is the case with proper furniture;<sup>7</sup> and proper service;<sup>8</sup> and the legal expenses in well-founded legal proceedings against himself.<sup>9</sup> Medical attendance on the wife during sickness,<sup>10</sup> and her funeral expenses,<sup>11</sup> fall under the same head.

Husband  
liable for  
necessaries  
furnished  
wife.

<sup>1</sup> *Boyd v. De la Montagnie*, 73 N. Y. 498; *Darlington's App.*, 86 Penn. St. 512.

<sup>2</sup> *Gamber v. Gamber*, 18 Penn. St. 363; *Grabill v. Moyer*, 45 Penn. St. 533; *Kelly's App.*, 77 Penn. St. 236.

<sup>3</sup> *Hinde v. Longworth*, 11 Wheat. 199; *Bergay's App.*, 60 Penn. St. 417; *Wilson v. Silkman* (1881), 10 Weekly Notes, 304.

<sup>4</sup> *Supra*, § 84.

<sup>5</sup> *Peters v. Fleming*, 6 M. & W. 42; *Bazeley v. Forder*, L. R. 3 Q. B. 362; *Raynes v. Bennett*, 114 Mass. 424; *Breinig v. Meitzler*, 23 Penn. St. 156; *Schouler, Husband and Wife*, §§ 101 *et seq.*; see *Willey v. Beach*, 115 Mass. 559; *Mohney v. Evans*, 51 Penn. St. 80; *Rea v. Durkee*, 25 Ill. 503. For the analogous case of necessities to infant, see *supra*, §§ 67–8.

<sup>6</sup> *Bazeley v. Forder*, *ut supra*, Cockburn, C. J., diss.

<sup>7</sup> *Hunt v. De Blaquiere*, 5 Bing. 550.

<sup>8</sup> *White v. Cuyler*, 6 T. R. 176; *Bazeley v. Forder*, *ut supra*.

<sup>9</sup> *Leake*, 2d ed. 574; *Grindell v. Godmond*, 5 A. & E. 755; *Turner v. Rookes*, 10 A. & E. 47; *Brown v. Ackroyd*, 5 E. & B. 819; *Baker v. Sampson*, 14 C. B. N. S. 383; *Wilson v. Ford*, L. R. 3 Ex. 63; *Pierce v. Pierce*, 9 Hun, 50; *Porter v. Briggs*, 38 Iowa, 166; *Warner v. Ryan*, 28 Wis. 517; but see, *contra*, as a common law rule, *Ray v. Adden*, 50 N. H. 82; *Coffin v. Dunham*, 8 Cush. 404; *Sheldon v. Pendleton*, 18 Conn. 417; *Dow v. Eyster*, 79 Ill. 254; *Pearson v. Darrington*, 32 Ala. 227; see *supra*, § 71, *infra*, § 122.

<sup>10</sup> *Harris v. Lee*, 1 P. Wms. 482; *Mayhew v. Thayer*, 8 Gray, 172.

<sup>11</sup> *Sears v. Giddey*, 41 Mich. 90. See for other cases, *infra*, § 757, last sentence.

## CHAPTER IV.

## ALIENS.

Capacity of aliens limited, § 93.

Contracts with alien enemies void,  
§ 94.

§ 93. As is shown more fully in another work,<sup>1</sup> aliens, in all jurisdictions in the United States, have now the same civil rights, so far as concerns contracts, as citizens. The only limitation on their business capacity that remains is, that in some states they are prevented from holding real estate permanently unless they become residents, or declare an intention to become naturalized.<sup>2</sup>

Capacity of  
aliens limited.

§ 94. A contract with an alien enemy, unless licensed by the home government, is void both in law and equity.<sup>3</sup> Licenses are personal franchises, and are not transferable;<sup>4</sup> and are to be limited to their specific objects.<sup>5</sup> The subject of an alien state at war with the state of the *forum* may bring suit if his residence be permitted by the sovereign of the *forum*.<sup>6</sup> And permission is to be inferred from non-expulsion.<sup>7</sup> As a general rule, however, trading without license with public enemies is void at common law;<sup>8</sup> and the same rule applies to trading with belligerent insurgents.<sup>9</sup> Contracts, previously valid, are suspended during hostilities.<sup>10</sup>

Contracts  
with alien  
enemies  
void.<sup>1</sup> Whart. on Conf. of Laws, § 17.<sup>4</sup> *Infra*, § 475; Patten v. Nicholson,<sup>2</sup> See Phillips v. Moore, 100 U. S. 208; Hanenstein v. Lynham, 100 U. S. 483.

3 Wheat. 204.

<sup>5</sup> *Infra*, § 475.<sup>3</sup> *Infra*, §§ 473-8; Roll. Ab. Alien, B.; 1 Ch. on Con. 11th Am. ed. 258; Branden v. Nesbitt, 67 R. 23; Albrecht v. Sussman, 2 V. & B. 323; Barrick v. Buba, 2 C. B. N. S. 563; Scholefield v. Eichelberger, 7 Pet. 586; Griswold v. Waddington, 16 Johns. 438.<sup>6</sup> Walls v. Williams, 1 Salk. 46; Boulton v. Dobree, 2 Camp. 163.<sup>7</sup> Wells v. Williams, 1 Ld. Ray. 282; Clarke v. Morey, 10 Johns. 69; Russell v. Skipwith, 6 Binn. 241.<sup>8</sup> *Infra*, §§ 473-5.<sup>9</sup> *Infra*, § 474.<sup>10</sup> *Infra*, § 478.

## CHAPTER V.

## AGENTS.

Agent may bind principal by contract, § 96.

§ 96. THE power of agents to bind their principals by contract is discussed at large in another work, where the authorities are grouped and criticised. To now go over the same ground would not only unduly swell the present treatise, but would be virtually to reprint a large part of a volume with which this is intended to stand side by side. It is enough now to say, in general, that though in the classical Roman law an agent's power to bind his principal by independent contract was disputed, this power, when rightfully exercised, is now as fully conceded in states retaining the Roman common law as in those accepting the English common law. A principal, it is now also universally held, is chargeable with the representations of his agent when such representations were among the inducements which led to a contract which the principal seeks to enforce. Special authorization is not necessary, in order that the principal should be bound by any particular representations, when such representations are within the general range of the duties with which the agent is charged. A principal, also, is bound by all representations which are part of the *res gestæ*, and by the agent's fraudulent representations made in furtherance of the principal's plan. When an agent ignorantly makes a false statement of which the principal knows the falsity, the principal cannot avail himself of a bargain based on such representations.<sup>1</sup> An agent, also, authorized to sell, may do whatever is necessary to effect a sale, and may sell on credit when this is usual, though this does not necessarily imply a power

Agents may  
bind prin-  
cipal by  
contract.

<sup>1</sup> Whart. on Agency, §§ 146-176.

to pledge or to barter. Unless clothed with real or apparent authority from his principal, he cannot, ordinarily, transfer his principal's title. He is authorized, when representing his principal for the purpose, to collect or receive debts due his principal, to negotiate bills, to transact business abroad, and to take proper steps in maritime affairs involving the principal's interests.

In following sections it will be seen that:—

a principal is liable for his agent's representations when within the agent's range;<sup>1</sup> and this is eminently the case with corporations, who can act only through agents:<sup>2</sup>

an agent's misrepresentations may avoid a contract:<sup>3</sup>

an agent may become personally liable on an illegal contract:<sup>4</sup>

an agent cannot take advantage of his opportunities as agent to prejudice his principal;<sup>5</sup> nor can he usually set up illegality against his principal;<sup>6</sup> nor can he hold to a contract obtained by unduly influencing his principal:<sup>7</sup>

an agent is liable to his principal in account stated and for value due:<sup>8</sup>

the construction of letters of agency which will best support the good faith of the transaction will be sustained:<sup>9</sup>

an agent's debt cannot be set off against principal,<sup>10</sup> though the principal's may against the agent:<sup>11</sup>

a principal is liable for his agent's negligence:<sup>12</sup>

an agent is liable to third parties for his negligence;<sup>13</sup> and for money he has wrongfully paid over to principal after notice:<sup>14</sup>

an agent may sue in his own name:<sup>15</sup>

payment to and by an agent, when the agent is duly authorized, is equivalent to payment to and by principal:<sup>16</sup>

agency, however, cannot be proved by the agent's declarations.<sup>17</sup>

<sup>1</sup> *Infra*, §§ 269 *et seq.*

<sup>2</sup> *Infra*, §§ 130 *et seq.*

<sup>3</sup> *Infra*, § 214.

<sup>4</sup> *Infra*, § 359.

<sup>5</sup> *Infra*, §§ 378, 435.

<sup>6</sup> *Infra*, § 357.

<sup>7</sup> *Infra*, § 161.

<sup>8</sup> *Infra*, §§ 724, 774.

<sup>9</sup> *Infra*, § 656.

<sup>10</sup> *Infra*, § 102.

<sup>11</sup> *Infra*, § 1027.

<sup>12</sup> *Infra*, § 1052.

<sup>13</sup> *Infra*, § 1054.

<sup>14</sup> *Infra*, § 755.

<sup>15</sup> *Infra*, § 810 *a.*

<sup>16</sup> *Infra*, § 992.

<sup>17</sup> *Infra*, § 278. As to inferences from contract of agency, see *infra*, §§ 709 *et seq.*

## CHAPTER VI.

### LUNATICS, DRUNKARDS, AND SPENDTHRIFTS.

Total mental incapacity precludes contract, § 98.	Partnership contracts of lunatics voidable, § 112.
By early authorities lunacy not generally ground for avoidance, § 99.	Distinctive rule as to marriage contracts, § 113.
Subsequent tendency to hold such contracts void, § 100.	Distinctive rule as to divorce, § 113 <i>a</i> .
Exception as to necessities, § 101.	Party may himself avoid contract on ground of mental incompetency, § 114.
Prevalent view now is that where there is capacity there is liability; but that contract is voidable when made with party with notice, § 102.	And so of his administrator, § 115.
Question conditioned by fraud, § 103.	And so of guardian and assignee, § 116.
And by undue influence, § 104.	Other contracting party cannot avoid, § 117.
Notice to be inferred from facts, § 105.	Non-repudiation may be ratification, § 117 <i>a</i> .
Contracts bind when fair and beneficial, § 106.	Mere intoxication no ground for holding contract void, § 118.
Exception as to deeds, § 107.	Otherwise when there is fraud, § 119.
Lunatic may take title, § 107 <i>u</i> .	Ratification to be inductively shown, § 120.
And may transfer title and may endorse, § 108.	No defence in action for necessities, § 121.
Business capacity restored in lucid intervals, § 109.	Legal expenses may be necessities, § 122.
Monomania does not avoid contracts on other topics, § 110.	Inquisition <i>prima facie</i> evidence of incompetency, § 123.
On rescinding contract parties to be placed <i>in statu quo</i> , § 111.	Spendthrifts may be incapacitated by local statute, § 124.

§ 98. THEORETICALLY there is no person who can be spoken of as perfectly sane, and no one as perfectly insane. Between perfect sanity and perfect insanity the gradations are innumerable.<sup>1</sup> If it were possible to conceive of a person utterly deprived of intellect, there would be no difficulty in saying that the contracts of

Total mental incapacity precludes contract.

<sup>1</sup> See Wh. & St. Med. Jur. 4th ed. vol. i. §§ 4 *et seq.*



such persons would be void. The assertion, however, involves a contradiction in itself. To make a contract no fixed standard of intelligence is required. We cannot, therefore, say of any particular party actually assenting to an act, that he is absolutely incapable of contracting. But this incapacity may, in many instances, practically exist, as is the case with idiots and old persons whose powers of recollection and discrimination have almost entirely ceased. Of these we may say generally that such persons, not having contracting minds, cannot contract.<sup>1</sup> The true test is, not whether the party is capable of fully understanding the nature of an act and foreseeing its consequences, for this cannot be absolutely predicated of any person, but whether he is capable of seeing the act in the relations in which it would be seen by ordinary observers. If utterly deficient in this respect, he is insane.<sup>2</sup> The same reason

<sup>1</sup> *Sentance v. Pool*, 3 C. & P. 1; *Hall v. Warren*, 9 Ves. 605; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Ball v. Mannin*, 3 Bligh (N. S.), 1; *Burke v. Allen*, 29 N. H. 106; *Young v. Stevens*, 48 N. H. 135; *Van Deusen v. Sweet*, 51 N. Y. 378; see 16 Alb. L. J. 292; *Baldwin v. Duntun*, 40 Ill. 188; *Emery v. Hoyt*, 46 Ill. 258; *Somers v. Pumphrey*, 24 Ind. 231. In 1 Wh. & St. Med. Jur. 4th ed. (1882) the topic in the text is considered as follows: Lunatics in any view liable for necessities, § 1. Also liable for contracts during lucid intervals, § 2. Monomania does not incapacitate on other topics, § 3. By early authorities lunacy no ground for avoidance, § 4. Subsequent tendency to hold all contracts with lunatics void, § 5. Question conditioned by fraud, § 6. Inquisition only *prima facie* proof to third parties, § 6a. Better opinion that contracts by lunatics are voidable at option, § 7. Contracts executed in good faith will be sustained, § 8. Conflict as to whether deeds are voidable, § 9. In rescission parties to be placed *in statu quo*, § 10. Partnership contracts not dissolved, *ipso facto*, by lunacy,

§ 11. Administrators may avoid contract of insane decedent, § 12. And so of representatives and guardians, § 13. And so of party himself, § 14. Lunatic liable for torts, § 15.

Idiots are distinguished, by Lord Tenterden, in *Ball v. Mannin*, 3 Bligh (N. S.), 1, from lunatics by the test of permanency. As to idiocy, Lord Tenterden says: "I find in an old book on this subject, that if a person is capable of learning the alphabet, he is not within the legal definition of idiocy; yet it is impossible to hold that persons no further qualified are capable of executing a deed." And he further holds that it was right to tell a jury that to constitute mental incapacity, "it was not necessary he (the party whose sanity is in dispute) should be without any glimmering of reason."

<sup>2</sup> *Dennett v. Dennett*, 44 N. H. 531; *Mann v. Betterly*, 21 Vt. 326; *Brown v. Brown*, 108 Mass. 386; *Titcomb v. Vantyle*, 84 Ill. 371; *Willemin v. Dunn*, 93 Ill. 511; *Somers v. Pumphrey*, 24 Ind. 231; *Henderson v. McGregor*, 30 Wis. 78; *Coleman v. Frazer*, 3 Bush, 300.

which precludes the formation of a contract where the two parties are thinking about different things,<sup>1</sup> precludes its formation when one of the parties is not thinking at all.

By early authorities, lunacy, unless involving total incapacity, no ground for avoidance of contract

§ 99. The rule laid down by Coke, that a man "should not be allowed to stultify himself,"<sup>2</sup> was for some time so applied as to preclude either a party, or his representatives, from subsequently setting up his mental incapacity as a ground for avoiding a contract. This rule is as without foundation in the Roman law as it is repugnant to reason and good morals.<sup>3</sup>

Subsequent tendency to hold all contracts with lunatics void.

§ 100. The extreme view of Coke, that mental incapacity cannot be set up to avoid a contract, was followed, in natural reaction, by the acceptance of the rule that all contracts are avoided by proof of mental incapacity.<sup>4</sup> It is true that it is probable that nothing more was meant by this, than that when a man is transparently an idiot no contract made by him will be enforced.<sup>5</sup> It is certain that it was never meant, that when there is nothing in the conduct and appearance of a party to notify those dealing with him that he is insane, and

<sup>1</sup> *Infra*, §§ 177 *et seq.*

<sup>2</sup> 4 Co. 123; Co. Litt. 247 b.

<sup>3</sup> 1 Story, Eq. Jur. § 225; 1 Fonblanque's Eq., Bk. 1, ch. 2, § 1; Pollock, Wald's ed. 78. The Roman authorities distinguish between *furiosus* and the *mente captus* or *demens*. L. 25 C. de nupt. 5, 4; L. 8, § 1, D. de tut. dat. 26, 5; L. 6, D. de cur. fur. 27, 10; L. 28, C. de episc. aud. 1, 4, cited Windscheid, Pandekt. § 54, 11. Windscheid makes *Wahnsinn* convertible with lunacy, as afterwards defined, and *Geisteschwachheit* with idiocy, as defined above. In the Roman law, the lunatic is *furiosus*, the idiot *fatuus*. L. 2, D. de post. 3, 1; L. 21, D. de reb. auct. jud. 42, 5. Cicero, Tusc. iii. 5, speaks of the condition of the former as *insania*; and to same effect see L. un. C. 9, 7. Even as late as Brown v. Jodrell, 3 C.

& P. 30, where lunacy was pleaded as a defence to an action for work and labor done, Lord Tenterden said, "no person can be suffered to stultify himself, and set up his own lunacy in defence." He proceeded, however, to say that it would be otherwise, where the mental incapacity of one party was used by the other party to extort unfair conditions.

<sup>4</sup> See Lang v. Whidden, 2 N. H. 435; Mitchell v. Kingman, 5 Pick. 431; Grant v. Thompson, 4 Conn. 203; Rice v. Peet, 15 Johns. 503; Hope v. Everhardt, 70 Penn. St. 235; Fitzgerald v. Reed, 9 S. & M. 94; Hines v. Potts, 56 Miss. 346.

<sup>5</sup> To this effect is Dexter v. Hall, 15 Wall. 9. For an exposition of the fluctuations of English law, see Pollock, *op cit.*, 7-9.

when such parties have no notice of his insanity, their bargains with him, no matter how much they may be to his advantage, are void. That a person apparently sane, for instance, should lease a house and occupy it and then be protected from payment, the bargain having been fair and advantageous to him, or that under similar circumstances he should buy goods and use them, and then be relieved from paying for them, never could have been intended. But in the rebound from the position of Coke, it was natural that expressions should be dropped to the effect that lunacy of all kinds should in all cases destroy capacity to contract.

§ 101. Even supposing insanity to exist to such an extent as to preclude a party from making a binding contract, his estate will nevertheless be liable for necessities furnished for his support. Such, as we have seen, is the rule humanely prescribed in reference to infants,<sup>1</sup> and such, for the same reason, is the rule in reference to insane persons.<sup>2</sup> The wife of a lunatic may buy necessities for herself on his credit, though he be at the time confined in an asylum.<sup>3</sup> And a lunatic's liability for necessities continues even under a statute which provides that all the contracts of a lunatic under guardianship shall be void.<sup>4</sup> Legal expenses incurred in the protection of the lunatic and his estate fall under the head of necessities.<sup>5</sup>

Exception always recognized as to necessities.

§ 102. As insanity is a generic term, covering mental disturbance of all grades, the better view is, that no rule absolutely and universally determining its ef-

Prevalent view now is that where

<sup>1</sup> *Supra*, §§ 64 *et seq.*

<sup>2</sup> 1 Wh. & St. Med. Jur. 4th ed. § 1; Bagster v. Portsmouth, 7 D. & R. 614; 5 B. & C. 170; Niell v. Morley, 9 Ves. 478; Dane v. Kirkwall, 8 C. & P. 679; Tarbuck v. Bispham, 2 M. & W. 6; Sawyer v. Lufkin, 56 Me. 308; McCrillis v. Bartlett, 8 N. H. 569; Lincoln v. Buckmaster, 32 Vt. 652; Kendall v. May, 10 Allen, 59; Skidmore v. Romaine, 2 Bradf. (N. Y.) 122; Van Horn v. Hann, 39 N. J. L. 207; La Rue v. Gilkyson, 4 Barr, 375;

Richardson v. Strong, 13 Ired. L. 106; Carr v. Holliday, 5 Ire. Eq. 167; Northington *ex parte*, 1 Ala. Sel. Ca. 400; Coleman v. Frazer, 3 Bush, 300; McCormick v. Little, 85 Ill. 62; *Infra*, § 121.

<sup>3</sup> Read v. Legard, 6 Exch. 636; Shaw v. Thompson, 16 Pick. 198.

<sup>4</sup> McCrillis v. Bartlett, 8 N. H. 569.

<sup>5</sup> Meares *in re*, L. R. 10 Ch. D. 582; Williams v. Wentworth, 5 Beav. 325; Hallett v. Oakes, 1 Cush. 296; see *supra*, § 71; *infra*, § 122.

there is capacity there is liability: but that contract is voidable when made with party with notice.

fects can be imposed.<sup>1</sup> The monomaniac is held by the highest authorities to be insane; yet the monomaniac is responsible in matters to which his delusion does not extend. There are probably as few persons perfectly sane as there persons perfectly insane. No bargain was ever made in which one of

the parties was not superior to the other in mental capacity; none, if there was a consenting mind on both sides, in which absolute incapacity on either side could be proved. Hence, after first swinging to the position that insanity can never be set up by a party to avoid his contracts, and then rebounding to the position that all contracts by insane persons are void, the courts have settled on the rule that the question of competency is one of fact to be determined on the special circumstances of the particular case. If the party making a contract was at the time without the capacity to contract, then the contract is void. But such incapacity is rarely, if ever, absolute. The mere fact of apparent consent indicates some degree, however small, of reason.—The question then first arising is, was there reason sufficient for the particular act? “Whether in any particular case,” says Mr. Pollock,<sup>2</sup> “a state of consciousness of this kind (drunkenness) does or does not amount to absolute deprivation of a consenting mind for the purposes of contract, is a question which it would be probably impracticable and certainly undesirable for a court of justice to enter into. *The same considerations apply with almost or quite the same force to the capacity of a lunatic.*” And he declares the English rule to be “that the contract of a lunatic or drunken man, who by reason of his lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect upon his interest, is not void, but only voidable at his option; and this only if his state is known to the other party.” Wherever there is mental capacity to contract, in other words, there a contract may be made, subject to be avoided at the option of a party whose eccentricity or debility of mind has been knowingly practised on by the other side. When there

<sup>1</sup> 1 Wh. & St. Med. Jur. 4th ed. §§ 531 *et seq.*      <sup>2</sup> Pollock, 3d ed. 102.

is no capacity to contract,—i. e., in cases of idiocy and frenzy, —then there is no contract for want of a consenting mind.<sup>1</sup> The distinction between “voidable” and “void” contracts has been already generally discussed.<sup>2</sup> It is proper here to say, that the fact that “void” and “voidable” are used in many cases as convertible terms makes it necessary to appeal rather to the reason on which such cases rest than to their particular words.<sup>3</sup>

§ 103. A party who has mental capacity enough to make a contract which would bind him if fair, may, nevertheless, either in person or through his representatives, set up mental deficiencies as a defence when such deficiencies were fraudulently acted on by the opposing party to extort an undue advantage.<sup>4</sup> And imbecility or hal-

Question  
condition-  
ed by fraud.

<sup>1</sup> This is now finally established in England, in *Matthews v. Baxter*, L. R. 8 Exch. 132; affirming *Molton v. Camroux*, 4 Exch. 17, see *infra*, § 106. In this country may be cited to the same effect, *Hovey v. Hobson*, 53 Me. 451; *Young v. Stevens*, 48 N. H. 133; *Allis v. Billings*, 6 Met. 415; *Howe v. Howe*, 99 Mass. 88; *Ingraham v. Baldwin*, 9 N. Y. 45; *Riggs v. Tract Soc.*, 84 N. Y. 330; *Matthiesen R. R. Co. v. McMahon*, 38 N. J. L. 537; *Murray v. Carlin*, 67 Ill. 286; *McCormick v. Little*, 85 Ill. 62; *Scanlan v. Cobb*, 85 Ill. 296; *Willem v. Dunn*, 93 Ill. 511; *Van Patten v. Beals*, 46 Ind. 62; *Musselman v. Cravens*, 47 Ind. 1; *Freed v. Brown*, 55 Ind. 310; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Rusk v. Fenton*, 14 Bush, 490; *Elston v. Jasper*, 45 Tex. 409. In *Matthiesen R. R. Co. v. McMahon*, *supra*, though the court use the term void, the word is shown by the context to be meant in the sense of voidable.

<sup>2</sup> *Supra*, § 28; see also *infra*, § 114.

<sup>3</sup> The subject is considered more in detail in 1 Wh. & St. Med. Jur. 4th ed. §§ 5 *et seq.* To sustain a contract made with a lunatic on the ground that it

was made in good faith and for his benefit and without knowledge of his incapacity, and that it has been so far performed that the other party cannot, if it be rescinded, be placed *in statu quo*, these facts must be alleged and proved. *Riggs v. Tract Soc.*, 84 N. Y. 330, reversing S. C. 19 Hun, 481. In *Haydock v. Haydock*, 34 N. J. Eq. 570, affirming S. C. 33 N. J. Eq. 494, it was said by Reed, J., in the New Jersey Court of Appeals: “The influence which is undue in cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other.”

<sup>4</sup> *Infra*, §§ 157 *et seq.*, 232 *et seq.*; *Gartside v. Isherwood*, 1 Bro. C. C. 560; *Dane v. Kirkwall*, 8 C. & P. 679; *Dent v. Bennett*, 7 Sim. 539; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Grant v. Thompson*,

lucination in the party imposed on, the other party having notice of such disability and taking advantage of it, is a ground for setting aside a contract which would have been sustained had the parties been of equal intelligence.<sup>1</sup> But mere mental disparity between the parties, there being no fraud, will not be ground for interference.<sup>2</sup> If it were, few contracts would remain undisturbed.<sup>3</sup> And the better rule is, "that if the proof be clear that an executory contract to purchase was made in good faith, and for a full, fair price, when the lunacy of the vendor was neither known nor suspected, and that the contract was executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, the contract will be upheld."<sup>4</sup>

§ 104. The question of mental incompetency rarely presents itself detached from that of undue influence.<sup>5</sup> A person whose mind is enfeebled may make a will in solitude, but he cannot make a contract in solitude. To contract he must bring himself more or less completely within the sphere of the other contracting party; and it is

4 Conn. 208; Seeley v. Price, 14 Mich. 541; Henderson v. McGregor, 30 Wis. 78; Garrow v. Brown, 1 Wins. (N. C.) No. 2, Eq. 46; Rutherford v. Ruff, 4 Dessaus. 350; Birdsong v. Birdsong, 2 Head, 289; Killian v. Badgett, 27 Ark. 166.

<sup>1</sup> Allore v. Jewell, 94 U. S. 506; Harding v. Wheaton, 2 Mass. 375; Mann v. Betterly, 21 Vt. 326; Taylor v. Atwood, 47 Conn.—; Shakespeare v. Markham, 72 N. Y. 48; Hunt v. Moore, 2 Barr, 105; Beals v. See, 10 Barr, 60; Moore v. Hershey, 90 Penn. St. 196; Whitehorn v. Hines, 1 Munf. 557; Jones v. Perkins, 5 B. Mon. 222; Keeble v. Cummins, 5 Hayw. Tenn. 43; Buffalow v. Buffalow, 2 Dev. & B. Eq. 241; Rutherford v. Ruff, 4 Des. Eq. 350; Halley v. Troester, 72 Mo. 73; see Turner v. Rusk, 53 Md. 65; Clearwater v. Kimler, 43 Ill. 272; Myatt v. Walker, 44 Ill. 485; Emery v. Hoyt, 46 Ill. 258; Cadwallader v. West, 48 Mo. 483;

Seely v. Price, 14 Mich. 541; Jacox v. Jacox, 40 Mich. 473; Taylor v. Patrick, 1 Bibb, 168; Wilson v. Oldham, 12 B. Mon. 55; Birdsong v. Birdsong, 2 Head, 289; Killian v. Badgett, 27 Ark. 166; Henderson v. McGregor, 30 Wis. 78.

<sup>2</sup> Story Eq. Jur. 12th ed. § 224.

<sup>3</sup> *Infra*, § 158.

<sup>4</sup> Yaeger v. Skinner, 1 McCarter, 389, by Green, C.; S. P. Wilder v. Weakley, 134 Ind. 181; Ballard v. McKenna, 4 Rich. S. C. Eq. 358. The jury may consider how far the party was liable to be deceived, though the incapacity was only partial. Galpin v. Wilson, 40 Iowa, 90. See also Shakespeare v. Markham, 72 N. Y. 400, and Cadwallader v. West, 48 Mo. 483. In this last case, it was said that wherever inadequacy of consideration and mental weakness concur, the contract should be annulled. And see Owing's case, 1 Bland., 370, 390.

<sup>5</sup> See *infra*, § 157.

hard to conceive of a case, therefore, in which he is not at least in some degree influenced by such other party. The question, then, is, Was such influence *undue*? This is a question of fact, to be determined by induction from the circumstances of each case in the concrete. And the inference of fraud, in cases where the bargain is not equitable, rises in proportion to the obviousness of the mental incapacity of the party with whom the contract is made. Imbecility, when acted on by fraud, is ground for avoidance.<sup>1</sup> Hence a contract made by a person of weak intellect for the ordinary conveniences of life will be sustained, when a speculative contract by the same person, made under undue influence, will be set aside. An elderly woman of weak understanding, with independent means, for instance, may make a valid contract for the purchase of a house, or for the sale of securities, under trustworthy advice, when validity would be denied to contracts for speculations in which the same person was cajoled by undue and improper influence to engage.

§ 105. Whether parties dealing with a lunatic have notice of his lunacy is to be inferred from the circumstances of the case. The mere fact that the bargain he makes is adventurous is no such notice. “A merchant,” said Chief Justice Gibson,<sup>2</sup> “may be mad without showing it; and when such a man goes into the market, makes strange purchases, and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman would exclude every speculator from the transactions of commerce.” But when the conduct of the party in question is such as would create, in the minds of reasonable men, doubts as to his sanity, this is enough to put parties

Notice to  
be inferred  
from facts.

<sup>1</sup> *Niell v. Morley*, 9 Ves. 478; *Stockley v. Stockley*, 1 Ves. & B. 23; *Sentance v. Poole*, 3 C. & P. 1; *Conant v. Jackson*, 16 Vt. 335; *Somes v. Skinner*, 16 Mass. 348; *Caulking v. Fry*, 35 Conn. 170; *Johnson v. Johnson*, 10 Ind. 387; *Wray v. Wray*, 32 Ind. 126; *Jeneson v. Jeneson*, 66 Ill. 259; *Jacox v. Jacox*, 40 Mich. 478; *Neely v. Anderson*, 2 Strob. Eq. 262; *Hale v. Brown*, 11 Ala. 87; *Jones v. Perkins*, 5 B. Mon. 222; *Wilson v. Oldham*, 12 B. Mon. 55; *McFadden v. Vincent*, 21 Tex. 47. The subject of undue influence is hereafter distinctively considered. *Infra*, §§ 157 *et seq.*

<sup>2</sup> *Beals v. See*, 10 Barr, 60.

dealing with him on inquiry.<sup>1</sup>—That an inquisition of lunacy is *prima facie* proof of insanity will be hereafter seen.<sup>2</sup>

§ 106. A contract made with a lunatic in good faith, and in ignorance of his incapacity, cannot, after the property obtained has been enjoyed by the lunatic, be set aside or defeated by the latter or his representatives, unless the parties can be put *in statu quo*.<sup>3</sup>

Hence where a lunatic paid a deposit on a purchase of real estate from vendors who had no knowledge or notice of his lunacy, the contract being fair, he was held not entitled to recover back the sum so paid.<sup>4</sup> Even where a house taken on lease by a lunatic was unnecessary for his use, it was held that his lunacy was no defence to an action for use and occupation, it not appearing that the plaintiff was cognizant of the lunacy and took advantage of it.<sup>5</sup> And when by a fair bargain goods are sold to and enjoyed by one apparently sane, his lunacy cannot be set up in bar of payment of their price.<sup>6</sup> Nor does the mere fact that the contract is improvident, so far as concerns the lunatic, vitiate it, if there was no fraud, or notice of his lunacy to the other side.<sup>7</sup>

<sup>1</sup> *Lincoln v. Buckmaster*, 32 Vt. 652.

<sup>2</sup> *Infra*, § 123.

<sup>3</sup> *Beavan v. McDonnell*, 9 Ex. 309; *Molton v. Camroux*, 2 Exch. 487; *Moss v. Tribe*, 3 F. & F. 297; *McCrillis v. Bartlett*, 8 N. H. 569; *Young v. Stevens*, 48 N. H. 133; *Kendall v. May*, 10 Allen, 59; *Arnold v. Iron Works*, 1 Gray, 434; *Barnes v. Hathaway*, 66 Barb. 452; *Beals v. See*, 10 Barr, 56; *Lancaster Bk. v. Moore*, 78 Penn. St. 407; *Loomis v. Spencer*, 2 Paige, 158; *Behrens v. McKenzie*, 23 Iowa, 333; *Carr v. Holliday*, 1 Dev. & B. 344; *Carr v. Holliday*, Ired. Eq. 167; *Sims v. McLure*, 8 Rich. Eq. 386; *Northington ex parte*, 37 Ala. 496; *Beller v. Jones*, 22 Ark. 92. That such contracts may be ratified, see *infra*, § 117 a.

<sup>4</sup> *Beavan v. McDonnell*, 9 Exch. 309.

<sup>5</sup> *Dane v. Kirkwall*, 8 C. & P. 679.

<sup>6</sup> See *Baxter v. Portsmouth*, 2 C. & P. 178; 7 D. & R. 617.

<sup>7</sup> *La Rue v. Gilkyson*, 4 Barr, 375; *Beals v. See*, 10 Barr, 60. As tending to sustain the position in the text, see *Dane v. Kirkwall*, 8 C. & P. 679; *Nelson v. Duncombe*, 9 Beav. 211; *Sawyer v. Lufkin*, 56 Me. 308; *Hallett v. Oakes*, 1 Cush. 296; *Seaver v. Phelps*, 11 Pick. 304; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Riggs v. Tract Soc.*, 19 Hun, 481; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; S. C. 14 Hun 169; *Wilder v. Weakley*, 34 Ind. 181; *Simms v. McClure*, 8 Rich. Eq. 286; *Marmon v. Marmon*, 40 Mich. 478; *Henry v. Fine*, 23 Ark. 417; *Encking v. Simmons*, 28 Wis. 272; *Henderson v. McGregor*, 30 Wis. 78; *Fitzgerald v. Reed*, 9 Sm. & M. 97. As to ratification, see *infra*, § 117 a.

In *Kendall v. May*, 10 Allen, 59, the lunatic, who had been placed under guardianship, but whose guardian had been removed, and who had an income



§ 107. It was once said in England, however, that lunacy is always a defence to an action on a specialty, no matter how fair may have been the conduct of the other party, or how beneficial the transaction to the lunatic;<sup>1</sup> and though this is no longer the law, even as to deeds of real estate,<sup>2</sup> it is still (1882) held, in several states in this country, that a deed by a lunatic of real estate is void even as to innocent third parties for a full consideration.<sup>3</sup> But it is difficult to see on what this distinction rests. A person who is sane enough to make a contract without a seal is sane enough to make a contract with a seal.<sup>4</sup> If a party dealing *bona fide* with a person whose insanity is latent is entitled to protection, there is no reason why he should be stripped of this protection in cases in which a seal happens to be attached to the instrument of indebtedness. If a party is sufficiently sane to bind himself by simple contracts, justice to parties dealing innocently with him as well as to himself requires that he should be regarded as sane enough to bind himself by specialties.<sup>5</sup> And unless we hold that latent insanity, of

Exception  
as to deeds.

of ten thousand dollars a year, boarded with the plaintiff. The suit was brought in part to meet the expenses of a journey which the plaintiff took with the lunatic at the latter's request. This was allowed. "If without harm," said Chapman, C. J., "he could enjoy luxuries and gratify his tastes and fancies, he ought to be indulged in such enjoyments to a reasonable extent. If he enjoyed journeys, it was proper that he should be indulged in them." And the following was adopted from *Persse in re*, 3 Molloy, 94: "The maintenance of a lunatic is not limited as an infant's is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and, for solid enjoyments and substantial comforts, the court will, if necessary, go beyond the limits of income."

<sup>1</sup> See *Baxter v. Portsmouth*, 5 B. & C. 170; though see *Faulder v. Silk*, 3 Camp. 126.

<sup>2</sup> *Elliott v. Ince*, 7 De G. M. & G. 485; *aliter* as to voluntary deeds, *e. g.*, disentailing deeds.

<sup>3</sup> *Hovey v. Hobson*, 53 Me. 451; *Gibson v. Soper*, 6 Gray, 279; *Seaver v. Phelps*, 11 Pick. 304; *Van Deusen v. Sweet*, 51 N. Y. 378; *Desilver's Est.*, 5 Rawle, 111; *Rogers v. Walker*, 6 Barr, 371; *Crawford v. Scovell*, S. Ct. Penn. 1881; *Fitzgerald v. Reed*, 9 Sm. & M. 94; *Farley v. Parker*, 6 Oreg. 105. That deeds of insane persons are only voidable in Maryland, see *Turner v. Rusk*, 53 Md. 65; and so in New Jersey, *Blakeley v. Blakeley*, 33 N. J. Eq. 502.

<sup>4</sup> *Beavan v. McDonnell*, 9 Exch. 309.

<sup>5</sup> It is agreed, even by those who hold that a lunatic has no capacity to execute deeds for real estate, that such deeds may be ratified by the grantor

which the other contracting party had no suspicion, does not avoid a deed, there are few titles to real estate that can be regarded as secure.<sup>1</sup> If there be fraud (and without fraud we cannot conceive of a deed being executed by a person obviously and unquestionably insane), this, coupled with the insanity, vitiates the deed. But if a person apparently sane transacts business and executes deeds *bona fide*, and on a fair contract, then he must bear the loss, though a commission of lunacy, when duly perfected, may *prima facie* avoid subsequent deeds.<sup>2</sup>—What has been said in reference to sealed contracts by infants applies to sealed contracts by persons of impaired mind.<sup>3</sup> A party who is competent to make an unsealed contract is competent to make a sealed contract. There is nothing in a seal which requires for its imposition any greater power or maturity of intellect than is required for the signing of a name. Nor is there anything in sealed contracts which, as a rule, requires any such increased power or maturity. As things now stand, unsealed contracts (*e. g.*, negotiable paper and brokers' memoranda) affect the rights of parties at least as seriously as do sealed contracts. The distinction, in the present relation, is so unreasonable that it cannot be expected to linger much longer in our reports. The true rule is that "A voidable deed is capable of ratification, and if a grantor, when insane, makes a deed, and should afterwards in a lucid interval, well understanding the nature of the instrument, ratify and adopt it as his deed, as by receiving the purchase-money due under it, this would give effect to it and render it valid in the hands of the grantee."<sup>4</sup> And in respect

when of sound mind, or during a lucid interval. *Allis v. Billings*, 6 Met. 415; *Arnold v. Iron Works*, 1 Gray, 434; *Gibson v. Soper*, 6 Gray, 279; *Howe v. Howe*, 99 Mass. 88; *Trunkey, J., Crawford v. Scovell*, *ut supra*; *Key v. Davis*, 1 Md. 82; *Chew v. Bank*, 14 Md. 229.

<sup>1</sup> See *Campbell v. Hooper*, 3 Sm. & G. 153; *Matthews v. Baxter*, L. R. 8 Ex. 132; *Allis v. Billings*, 6 Met. 415; *Ingraham v. Baldwin*, 5 Selden, 45; *Desilver's Est.*, 5 Rawle, 111; *Bensell*

*v. Chancellor*, 5 Whart. 371; *Miller v. Craig*, 36 Ill. 109; *Somers v. Pumphrey*, 24 Ind. 231. That mental debility does not avoid deed, see *Dennett v. Dennett*, 44 N. H. 531.

<sup>2</sup> *Eaton v. Eaton*, 37 N. J. L. 108; *Rusk v. Fenton*, 14 Bush, 490; *Scanlan v. Cobb*, 85 Ill. 296; *Nichol v. Thomas*, 53 Ind. 42; *Freed v. Brown*, 55 Ind. 310; *infra*, § 123.

<sup>3</sup> *Supra*, § 38.

<sup>4</sup> *Allis v. Billings*, 6 Met. 415; adopted in *Blakeley v. Blakeley*, 33

to persons whose insanity is latent, and who possess at the time of the transaction a contracting mind, contracts by specialty should be placed under the same rule as parol contracts.<sup>1</sup> When advantage has been taken of mental incapacity, they should be set aside. When no such advantage has been taken, but the transaction was fair and reasonable, it should be sustained.<sup>2</sup>

§ 107 *a*. "A man of non-sane memory," it is said by Coke,<sup>3</sup> "may, without the consent of another, purchase lands;" and "idiots, madmen, lepers, deaf, dumb, and blind, minors, and all other reasonable creatures, have power to purchase and retain lands and tenements."<sup>4</sup> By deed poll a title can thus be granted to a lunatic, although the grantee would be under a legal disability to convey; and a deed to the lunatic can be perfected by delivery to a third person for his use.<sup>5</sup> And it was held in Michigan, in 1881, that a valid delivery of a deed, in consideration of an antecedent indebtedness, may be made to an imbecile, the transaction being fair and beneficial to the imbecile.<sup>6</sup>

§ 108. The fact that a person conveying property is insane, there having been no judgment of lunacy against him, and no notice to or negligence on the

Lunatics  
may take  
title.

Lunatic  
may trans-  
fer title,  
and may  
endorse.

N. J. Eq. 502; S. P. Bassett *v.* Brown, 105 Mass. 551; Allen *v.* Berryhill, 27 Iowa, 534; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236; Waters *v.* Barral, 2 Bush, 598. And see as generally sustaining the text, Hovey *v.* Hobson, 53 Me. 451; Allis *v.* Billings, 6 Metc. 415; Arnold *c.* Richmond Iron Works, 1 Gray, 434; Gibson *v.* Soper, 6 Gray, 279; Howe *v.* Howe, 99 Mass. 88; Valpey *v.* Rea, 130 Mass. 384; Eaton *v.* Eaton, 37 N. J. L. 108; Key *v.* Davis, 1 Md. 82; Chew *v.* Bank, 14 Md. 299; Evans *c.* Horan, 52 Md. 602; Rusk *v.* Fenton, 14 Bush, 490; Ashcraft *v.* De Armand, 44 Iowa, 229; Scanlan *v.* Cobb, 85 Ill. 296; Nichol *v.* Thomas, 53 Ind. 42; Freed *v.* Brown, 55 Ind. 310; Elston *v.* Jasper, 45 Tex. 409.

<sup>1</sup> As to distinction, see *infra*, § 677.

<sup>2</sup> See *infra*, §§ 157 *et seq.*

<sup>3</sup> I. ch. i. § 1, 25.

<sup>4</sup> See also 1 Steph. Com. 441; 2 Br. & Had. Com., Am. ed. 714; Concord Bank *v.* Bellis, 10 Cush. 276.

<sup>5</sup> Concord Bank *v.* Bellis, *ut supra*.

<sup>6</sup> Campbell *v.* Kuhn, 24 Alb. L. J. 217, citing Garnons *v.* Knight, 5 B. & C. 671; Gould *v.* Day, 94 U. S. 405; Buffnom *v.* Green, 5 N. H. 71; Hastings *v.* Merriam, 117 Mass. 245; Regan *c.* Howe, 121 Mass. 424; Merrills *v.* Swift, 18 Conn. 257; Tibbals *v.* Jacobs, 31 Conn. 428; Church *v.* Gilman, 15 Wend. 656; Mitchell *v.* Ryan, 13 Oh. St. 377; Hosley *v.* Holmes, 27 Mich. 416; Latham *v.* Udell, 38 Mich. 238; Wesson *v.* Stephens, 2 Ired. Eq. 557.

part of the other side, does not avoid the transfer, when it is so far executed that the parties cannot be put *in statu quo*. Nor when the contract is so far executed that the prior condition of things cannot be restored, will the contract be afterwards set aside.<sup>1</sup> And an endorsement by a lunatic to a promissory note, if without fraud or notice, transfers the title to the note.<sup>2</sup> It is true that it has been held in Pennsylvania that a lunatic is not liable on a mere accommodation endorsement.<sup>3</sup> But as a rule insanity of the maker of a note is no defence to a suit by a *bona fide* holder for value without notice.<sup>4</sup>

<sup>1</sup> *Elliott v. Ince*, 7 De G. M. & G. 475; *La Rue v. Gilkyson*, 4 Barr, 375; *Lancaster Co. Bank v. Moore*, 78 Penn. St. 407; *Wilder v. Weakley*, 34 Ind. 181.

<sup>2</sup> *Caulkins v. Fry*, 35 Conn. 170; *Miller v. Finley*, 26 Mich. 249. That such is the case with infants, see *supra*, §§ 35, 37. See *Sentance v. Poole*, 3 C. & P. 1, as to which Mr. Parsons, Cont. i. 385, says: "It is difficult to see how one could indorse a bill or note in such a way that its appearance would excite no suspicion, and yet be so drunk as to know nothing of what he was doing; and unless the indorser were utterly incapacitated, it should seem that a third party, taking the note innocently and for value, ought to hold it against him."

<sup>3</sup> *Moore v. Hershey*, 90 Penn. St. 196; *Wirebach v. Bank*, 97 Penn. St. 543.

<sup>4</sup> *Pollock*, 3d ed. 99 *et seq.*; *State Bank v. McCoy*, 69 Penn. St. 204.

In *Wirebach v. Bank*, *ut supra*, Trunkey, J., said: "The question now presented is, will an action lie on the accommodation indorsement of a promissory note by a lunatic? If the determination of this was not made, it was very clearly indicated in *Moore v. Hershey*, 9 Norris, 196. There the action was by an indorsee against the maker of a promissory note, and evidence was offered to prove that the

maker had received no consideration, which fact the plaintiff had admitted in conversation, proof having been made that the maker was insane, but the offer was rejected, the court below ruling that as the note in suit was commercial paper, and the plaintiff a holder for value, the consideration could not be inquired into. If the holder could recover against one who was insane when he indorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or indorses a note may by his representative plead his infancy as a complete defence. In like manner a lunatic may plead insanity and want of consideration. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud or want of consideration. Then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. Nor would a nominal sum be sufficient. It is said the law protects those who cannot protect themselves, but it would be sorry protection, if one holding a valid note against a helpless man for \$4000 could get it renewed for \$10,000, and recover the full amount of the renewal note. The consideration must be fair and

§ 109. The fact that a party was insane before executing a particular contract, and was insane afterwards, does not invalidate the contract, if he was sane at the time it was made.<sup>1</sup> If, however, such prior and subsequent insanity be proved, the burden is on the party setting up a lucid interval to prove it.<sup>2</sup> But periodic and intermittent incapacity (*e. g.*, epilepsy) cannot be presumed to be continuous and permanent.<sup>3</sup>

Business capacity restored in lucid intervals.

§ 110. Were a monomaniac precluded from executing contracts relating to topics to which his monomania does not extend, the business power of the country would be seriously impaired, since some of the most efficient business men have been monomaniacs on special topics.<sup>4</sup> Hence, it has been repeatedly held that the existence of a collateral monomania does not impair capacity to make a contract on a matter to which the monomania does not relate.<sup>5</sup> Responsibility, in other words, as to a

Monomania does not avoid contracts on other topics.

conscionable, and then it is proper. When it is a pre-existing debt, or money loaned, its measure is certain, and the insane man is liable for no more than the amount of such debt or loan. The holder of a madman's note stands in no better position than the payee. An accommodation maker or indorser, in fact, is a surety for the principal debtor, and when he is an infant or an insane person he or his representative may defend as in other forms of contract. We are not persuaded that commercial or public interests require an adjudication that a lunatic who signs a contract as surety, or as accommodation maker or indorser, is liable for the debt of another man."

<sup>1</sup> Story on Contracts, § 74; Hall v. Warren, 9 Ves. 605; Gore v. Gibson, 13 M. & W. 623; Tozer v. Saturlee, 3 Grant (Penn.), 162; Blakeley v. Blakeley, 33 N. J. Eq. 502; Lilly v. Waggoner, 27 Ill. 395; McCormick v. Littler, 85 Ill. 62; Curtis v. Brownell, 42 Mich. 165; Jones v. Perkins, 5 B.

Mon. 222; Frazer v. Frazer, 2 Del. Ch. 260.

<sup>2</sup> Wh. on Ev. § 1253; Attorney Gen. v. Parnter, 3 Bro. C. C. 443; Staples v. Wellington, 58 Me. 454; Amentz v. Anderson, 3 Pitts. 310; Rush v. Magee, 36 Ind. 69; State v. Wilner, 40 Wis. 304; State v. Reddick, 7 Kan. 143; McCormick v. Littler, 85 Ill. 62.

<sup>3</sup> Amentz v. Anderson, 3 Pitts. 310; Brown v. Riggen, 94 Ill. 560; Carpenter v. Carpenter, 8 Bush, 283.

<sup>4</sup> See 1 Wh. & St. Med. Jur. §§ 53 *et seq.*

<sup>5</sup> Attorney General v. Parnter, 3 Bro. C. C. 443; Jenkins v. Morris, L. R. 14 Ch. D. 674; Banks v. Goodfellow, L. R. 5 Q. B. 549; Hovey v. Hobson, 55 Me. 256; Dennett v. Dennett, 44 N. H. 531; Somes v. Skinner, 16 Mass. 348; Osterhout v. Shoemaker, 3 Hill, N. Y. 573; Hall v. Unger, 2 Abb. U. S. 507; Lozeau v. Shields, 23 N. J. Eq. 509; Turner v. Rusk, 53 Md. 65; Speers v. Sewell, 4 Bush, 239; see Bond v. Bond, 7 Allen, 1. That an insane de-

particular line of acts, is not impaired by insanity in reference to another line of acts.<sup>1</sup> And the same rule applies to insane delusions. They do not affect capacity in reference to subjects to which they do not relate.<sup>2</sup> It is sufficient if there be mental capacity enough to transact with intelligence the particular business.<sup>3</sup> The proper test is, was the party, at the time of the contract, insane as to the particular thing to which the contract related? It is not necessary to inquire whether the party in question was generally insane. We have to limit ourselves to the litigated transaction, and inquire what was his capacity in that relation. He may have been of good understanding in reference to other matters, but this will not validate the contract if in reference to its subject matter he was under the influence of insane delusions, of which the other party had notice. On the other hand, no matter how numerous and how strong may have been his insane delusions on other topics, this will not invalidate a contract made by him concerning which he had no insane delusions.<sup>4</sup> "It is to be noted," says Mr. Pollock, in 1881,<sup>5</sup> "that the existence of partial delusions does not necessarily amount to insanity for the purposes of this rule. The judge or jury, as the case may be, must in every case consider the practical question whether the party was incompetent to manage his own affairs in the matter in hand."<sup>6</sup>

lusion as to a particular topic incapacitates as to such topic, see *Boyce v. Smith*, 9 Grat. 704; *Lemon v. Jenkins*, 48 Ga. 313.

<sup>1</sup> Wh. Cr. L. 8th ed. § 37; *Odell v. Buck*, 21 Wend. 142; *Samuel v. Marshall*, 3 Leigh, 567.

<sup>2</sup> *Staples v. Wellington*, 58 Me. 453; *Emery v. Hoyt*, 46 Ill. 258.

<sup>3</sup> *Hovey v. Chase*, 52 Me. 305; *Dennett v. Dennett*, 44 N. H. 531; *Mann v. Betterby*, 21 Vt. 326; *Farnam v. Brooks*, 9 Pick. 220; *Baldwin v. Duntun*, 40 Ill. 188; *Clearwater v. Kimber*, 43 Ill. 272; *Burgess v. Pollock*, 53 Iowa, 273.

<sup>4</sup> *Ball v. Mannin*, 1 Dow. & C. 380; 3 Bligh (N. S.), 1. In *Jenkins v. Morris*,

L. R. 14 Ch. D. 674, a lease was sustained, though the lessor was under the insane delusion that the land leased was impregnated with sulphur, though he was otherwise sane. See to same effect remarks of Bramwell, L. J., in *Drew v. Nunn*, L. R. 4 Q. B. D. 669.

<sup>5</sup> 3d ed. 105.

<sup>6</sup> To this are cited *Jenkins v. Morris*, L. R. 14 Ch. D. 674; *Drew v. Nunn*, L. R. 4 Q. B. D. 669. To same effect is *Hovey v. Hobson*, 53 Me. 451; *Dennett v. Dennett*, 44 N. H. 531; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Miller v. Craig*, 36 Ill. 109. As to the coexistence of insane delusions with general business capacity, see 1 Wh. & St. Med. Jur. 4th ed. §§ 53 *et seq.*

§ 111. As has been already incidentally noticed, a party who seeks to rescind a contract made by him when insane, is ordinarily bound, as a preliminary, to restore to the other party, when practicable, the price he received as consideration.<sup>1</sup> In those courts, however, which hold that the deed of a lunatic is *ipso facto* void, an offer of restitution of the purchase money of land is not a condition precedent to the recovery of the land by the guardian of the lunatic.<sup>2</sup> But the better rule is, as stated by Mr. Pollock,<sup>3</sup> that "when a contract has been entered into in good faith with a person who appears and is believed to be of sound mind, but who is, in fact, of unsound mind, and the contract has been performed, so that the parties cannot be replaced in their original position, it cannot be set aside by the person of unsound mind, or his representatives." And he cites to this effect the following passage from the judgment of the exchequer chamber in a leading case, in which the law was in this respect definitely settled: "The modern cases show that when that state of mind (lunacy or drunkenness, even if such as to prevent a man from knowing what he is about) was unknown to the other contracting party, and no advantage was taken of the lunatic (or drunken man), the defence cannot prevail, especially where the contract is not merely executory, but executed, in the whole or in part, and the parties cannot be restored altogether to their original positions."<sup>4</sup>

On rescission parties to be placed *in statu quo*.

<sup>1</sup> *Supra*, §§ 100 *et seq.* *Infra*, § 285. Scanlan v. Cobb, 85 Ill. 296.

<sup>2</sup> *Supra*, § 107; Hovey v. Hobson, 53 Me. 451; Gibson v. Soper, 6 Gray, 279; see Eaton v. Eaton, 37 N. J. L. 118; Nichol v. Thomas, 53 Md. 42; Lagay v. Marston, 32 La. Ann. 170.

<sup>3</sup> Pollock, Wald's ed. 81.

<sup>4</sup> Molton v. Camroux, 4 Exch. 17; aff. Beavan v. McDonnell, 9 Exch. 309; Price v. Bennington, 3 Mac. & G. 486 (reversing S. C. 7 Hare, 394); Elliott v. Ince, 7 D. M. G. 475. Mr. Pollock adds: "The complete judicial interpretation of the result of Molton v. Camroux was not given until the re-

cent case of Matthews v. Baxter, L. R. 8 Exch. 132. The declaration was for breach of contract in not completing a purchase; plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew; replication, that after the defendant became sober and able to transact business, he ratified and confirmed the contract. As a merely void agreement cannot be ratified, this neatly raised the question whether the contract was void or only voidable; the court held unanimously (one mem-

§ 112. In accordance with the modern doctrine above stated, the insanity of a partner does not by itself dissolve a partnership, though it may be ground for a judicial decree of dissolution. The same remark applies to drunkenness. Were it otherwise, the question whether partnerships including numerous partners are in continued existence would often be one of doubt.<sup>1</sup> It has, indeed, been held that an inquest of lunacy against a partner dissolves *ipso facto* the partnership.<sup>2</sup> But this can only be as to persons parties to or at the most having notice of the inquest. As to others it is *res inter alios acta*.<sup>3</sup>

§ 113. On the one hand, proof of latent lunacy at the time of marriage will not avoid a marriage; since otherwise, few persons could be sure of legitimate descent, and titles by succession would, in many cases, be made to depend upon occult and uncertain conditions. Mere collateral delusions, also, do not avoid a marriage; and no matter how eccentric a person may be, his marriage, until judicially avoided, will be regarded as passing title under the distribution statutes.<sup>4</sup> An inquisition of lunacy, that a party to a marriage was insane at the time, is only *prima facie* proof of such insanity; and his sanity may be established in the face of such finding.<sup>5</sup> On the other hand, a marriage which a lunatic has been fraudulently induced to solemnize will be annulled;<sup>6</sup> though not ordinarily after

ber of it expressly on the authority of *Molton v. Camroux*) that it was only voidable, and the replication therefore good." See to same effect *Eaton v. Eaton*, 37 N. J. L. 118; *Evans v. Horan*, 52 Md. 602; *Scanlan v. Cobb*, 85 Ill. 296; *Ashcraft v. De Arman*, 44 Iowa, 229; *Rusk v. Fenton*, 14 Bush, 490.

<sup>1</sup> *Lindley on Part. i.* 235, cited and adopted by *Pollock, Wald's ed.* 82.

<sup>2</sup> *Story on Part. § 295*; *Isler v. Baker*, 6 Humph. 85.

<sup>3</sup> *Infra*, § 123; *Wh. on Ev. §§ 403*, 812, 1254.

<sup>4</sup> *Wiser v. Lockwood*, 42 Vt. 720.

<sup>5</sup> *Banker v. Banker*, 63 N. Y. 409. *Infra*, § 123.

<sup>6</sup> *Portsmouth v. Portsmouth*, 1 Hag. Ec. R. 355; *Hancock v. Peaty*, L. R. 1 P. & D. 835; see *Atkinson v. Medford*, 46 Me. 510; *Middleborough v. Rochester*, 12 Mass. 363; *Wightman v. Wightman*, 4 Johns. Ch. 343; *Banker v. Banker*, 63 N. Y. 409; *Atkinson v. Medford*, 46 Me. 510; *Crump v. Morgan*, 3 Ired. Eq. 91; *Foster v. Means*, 1 Speer's Eq. 569; *Clement v. Mattison*, 8 Rich. 98; *Cole v. Cole*, 5 Sneed, 57; *Rawdon v. Rawdon*, 23 Ala. 565; *Ward v. Dulaney*, 23 Miss. 410.



the lunatic's death, or after a long lapse of time.<sup>1</sup> A voidable marriage solemnized by a party when insane, may be ratified by him when in his right mind;<sup>2</sup> and this holds good as to marriage by an intoxicated person.<sup>3</sup> But a marriage absolutely void (*e. g.*, by a total maniac) is on principle not susceptible of subsequent ratification.<sup>4</sup>

<sup>1</sup> *Wiser v. Lockwood*, 42 Vt. 720; *Rawdon v. Rawdon*, *ut supra*. That under N. Y. Stat. such marriage is only voidable, see *Stuckey v. Mather*, 24 Hun, 461.

<sup>2</sup> *Bishop*, Mar. and Div. 6th ed. § 135; *Cole v. Cole*, 5 Sneed, 57; *Rawdon v. Rawdon*, 28 Ala. 565.

<sup>3</sup> *Clement v. Mattison*, 3 Rich, 193.

<sup>4</sup> *Crump v. Morgan*, 3 Ired. Eq. 91; *Ward v. Dulaney*, 23 Miss. 410. In the London Law Times for Jan. 7, 1882, p. 168, we have the following: "The Lancet remarks that, in the divorce court, on Friday, the 16th Dec., a very important case was settled in reference to insanity. The case was *Hunter v. Edney*. In this case a woman was married, but refused on the wedding night to allow the marriage to be consummated. The husband sent for the mother of the woman, who took her home after she had been seen by Dr. Miskin, a general practitioner in the neighborhood. Dr. Miskin was of the opinion that then she was insane. Some few weeks later, Dr. Savage, of Bethlem, saw the case, and decided that the woman was suffering from melancholia, and not fit to enter into a contract, and that in his opinion she had so suffered for some time. The whole case took but a short part of one day, and there was really no opposition, for though the wife was in court, and elected to go into the witness-box, she did not deny any of the statements made, but said that she had no knowledge of some of the things which were proved to have taken place during the

times soon following her wedding. Thus, she did not remember, so she said, making an attempt to strangle herself. The judge, Sir J. Hannen, summed up clearly and fairly, and pointed out that the woman did not seem capable of understanding actions free from the influence of delusions, and was therefore incapable of entering into a contract like that of marriage, and he decreed the marriage null. This is the first case of the kind which has been decided, and is not by any means a solitary one, so far as the insanity and marriage are concerned. During the past year several cases have, we believe, been in Bethlem in which marriage was not consummated in consequence of insanity. In one a man heard a voice telling him he must not touch his wife, and the same patient later heard a voice telling him not to eat. The case decided is a first one, and is incomplete. What line would have been followed if the marriage had been consummated, and, still more, if a child had been begotten? The inability to contract would have been the same, but we fear there might have been greater difficulty to persuade a jury—if a jury had been deciding—that a divorce was justifiable. In murder cases the feeling of many is moved against taking human life, but the life-long misery caused by an unjust marriage in which one of the contracting parties was insane, is a suffering of the innocent which is unhappily overlooked. Such cases make it all important that something should be

§ 113 *a*. It has been argued, that as an insane person is irresponsible, a divorce on ground of adultery cannot be granted against an insane person.<sup>1</sup> To this it may be replied that divorce statutes are meant to relieve parties from intolerable wrong, and the wrong of adultery is none the less intolerable, because the party committing it was insane.<sup>2</sup> This view was intimated in England in the Mordaunt case, although that case was decided upon the peculiar construction of a statute.<sup>3</sup> The insanity of either party is now held no bar to a divorce in England;<sup>4</sup> but in this country it has been held that a divorce will not be decreed in favor of an insane plaintiff.<sup>5</sup>

§ 114. Although it was once held otherwise, it is now settled, that a party who makes, when insane, a contract which would otherwise bind him, may avoid it, when restored to his reason, and when it is still unexecuted, by setting up his incompetency at the time of the contract.<sup>6</sup> And when a contract is

done, and every step such as the one reached in the above decision carefully watched." In *Baker v. Baker*, L. R. 5 P. D. 145, it was held that the committee of a lunatic's estate was the proper person to bring, on his behalf, proceedings of divorce against his wife. It is said in *Hancock v. Peaty*, L. R. 1 P. & D. 335, that "the question for the court is, whether the mind of the contracting party is diseased or not at the time of the contract, and if the evidence establishes that the mind was, at the time of entering the contract, diseased, the court will not enter into the extent of the derangement." Per Lord Penzance.

That cohabitation with recognition is strong proof of ratification, see Bishop, Mar. and Div. 6th ed. §§ 135 *et seq.*

<sup>1</sup> *Nichols v. Nichols*, 31 Vt. 328; *Wray v. Wray*, 19 Ala. 522; *Rathbun v. Rathbun*, 40 How. Pr. 328; though it is conceded that suit may be brought for adultery committed when sane. *Ib.*

<sup>2</sup> *Matchin v. Matchin*, 6 Barr, 332; 1 Wh. & St. Med. Jur. § 18.

<sup>3</sup> Stat. 20 & 21 Vict. c. 85, § 27. See the cases, *Mordaunt v. Mordaunt*, L. R. 2 P. 109, 382.

<sup>4</sup> *Baker v. Baker*, L. R. 5 P. D. 145, affirmed 6 P. D. 12; *Mordaunt v. Moncrieffe*, L. R. 2 H. L. (Sc.) 374.

<sup>5</sup> *Worthy v. Worthy*, 36 Ga. 45; *Bradford v. Abend*, 89 Ill. 78.

<sup>6</sup> *Beavan v. McDonnell*, 9 Exch. 309; *Lang v. Whidden*, 2 N. H. 435; *Seaver v. Phelps*, 11 Pick. 304; *Gibson v. Soper*, 6 Gray, 279; *Grant v. Thompson*, 4 Conn. 203; *Rice v. Peet*, 15 Johns. 503; *Loomis v. Spencer*, 2 Paige, 158; *Bensell v. Chancellor*, 5 Whart. 371; *Morris v. Clay*, 8 Jones, N. C. 216; *McCreight v. Aiken*, 1 Rice, 56; *Titcomb v. Vantyle*, 84 Ill. 371; *McCarty v. Kearnan*, 86 Ill. 291; *Van Patten v. Beals*, 46 Ind. 62; *Fitzgerald v. Reed*, 9 S. & M. 94; *Broadwater v. Darne*, 10 Mo. 277.

divisible, it binds the lunatic (supposing it to have been fair, and executed by the other party in ignorance of his lunacy) so far as concerns the part executed, while the unexecuted part cannot be enforced.<sup>1</sup> But no proceedings can be taken by the lunatic personally until his reason is restored.<sup>2</sup>

§ 115. The same right passes to the administrators and heirs of a party claimed to be a lunatic.<sup>3</sup> And so of his administrators.

§ 116. On the guardian, curator, committee, or assignee of a person found to be a lunatic the duty is incumbent of testing the question of the validity of his prior business transactions. And by such official representative the lunatic's contracts may be ratified or annulled; the guardian or curator (as the case may be) being entitled to bring suit to recover back property which the lunatic had sold, but which he had not the capacity to convey.<sup>4</sup> And so of his guardian or assignee.

§ 117. The fact that one party to an executed contract was insane at the time of its execution cannot be set up by the other party in bar to a suit brought against him to comply with the conditions undertaken by him, if these conditions are not dependent on acts which the plaintiff is incapable of performing.<sup>5</sup> Other contracting parties cannot avoid.

§ 117 *a*. Following the distinction already noticed between "void" and "voidable" transactions,<sup>6</sup> we must hold that, when a person at the time absolutely without capacity to contract makes an apparent contract, such apparent contract is void; and so when the mind of one contracting party is fixed on a different object from that of the other contracting party.<sup>7</sup> It is otherwise, however, when one of the contracting parties is not absolutely Non-repudiation may be ratification.

<sup>1</sup> *Beavan v. McDonnell*, 9 Exch. 309. As to divisible considerations, see *infra*, § 511.

<sup>2</sup> *Turner v. Rusk*, 53 Md. 65. As to ratification, see *infra*, § 117 *a*. As to distinction between "void" and "voidable" contracts, see *supra*, §§ 28, 56.

<sup>3</sup> *Beverley's case*, 4 Rep. 123 *b*; *Hovey v. Hobson*, 53 Me. 451; *Lazell v. Pennick*, 1 Tyler, 247.

<sup>4</sup> *McCrillis v. Bartlett*, 8 N. H. 569; *Gibson v. Soper*, 6 Gray, 279. In *Baker v. Baker*, L. R. 5 P. 142, it was held that the committee of the estate of a lunatic was the proper party to sue for a divorce on account of the adultery of the lunatic's wife.

<sup>5</sup> *Allen v. Berryhill*, 27 Iowa, 534.

<sup>6</sup> *Supra*, §§ 28, 56.

<sup>7</sup> *Supra*, § 4; *infra*, § 177.

without capacity to contract, and does contract as to a matter within the range of his capacity. Supposing that he should subsequently turn out to have been "insane" at the time of such contract, and may even have been so judicially pronounced, yet, on his restoration to sanity, such contract binds him if not repudiated by him when brought before him for ratification.<sup>1</sup> The question, however, may after all be one merely as to the meaning of the words. A person who has recovered from an attack of insanity continues to enjoy the fruits of a bargain made by him when at least partially insane. He does not repudiate the contract, and, as he does not, his action may be called non-repudiation. Yet it is none the less ratification, though he has not said one word in affirmance of the bargain. For ratification in this, as in the parallel case of infancy, is a matter of induction from all the circumstances of the particular case.<sup>2</sup>

§ 118. Intoxication is a term embracing many degrees. In

Mere intoxication no ground for holding contract void.

some countries, few bargains are struck at the fairs where business is largely done without one at least of the parties having previously taken some stimulant. Intoxication also may be by other modes than

spirituous liquors; medicines, when essential to sustain persons of failing health, being taken by them when any particular business transaction is impending, so as to strengthen them for the task. It does not follow that a man is unfit for business because he is acting under stimulants. Some of the most eminent statesmen and lawyers—*e. g.*, the younger Pitt, and Luther Martin—made their best speeches, and conducted

<sup>1</sup> It is only by this distinction that I am able to reconcile the conflicting cases. See cases cited, §§ 106–113; *Blakeley v. Blakeley*, 33 N. J. Eq. 502, and a learned note thereto; *Matthiesen R. R. Co. v. McMahan*, 38 N. J. L. 537; *Evans v. Horan*, 52 Md. 610; *Freed v. Brown*, 55 Ind. 310; *Murray v. Carlin*, 67 Ill. 286; *Searle v. Galbraith*, 73 Ill. 269; *Titcomb v. Vantyle*, 84 Ill. 371; *McCormick v. Littler*, 85 Ill. 32; Wil-

lemine *v. Dunn*, 93 Ill. 511. See also 1 Wh. & St. Med. Jur. § 7. When *Bramwell, L. J.*, in *Drew v. Nunn*, L. R. 4 Q. B. D. 669, said, "If a man becomes *so far insane as to have no mind*, perhaps he ought to be deemed dead for the purpose of contracting;" he probably had the distinction of the text in mind.

<sup>2</sup> *Infra*, § 120; *supra*, §§ 58 *et seq.*

business most ably, when under stimulants. To say, therefore, that intoxication avoids contracts would subject business transactions to a distressing uncertainty. Nor is this all. A party who wanted to make a bargain, as to which he could play fast and loose, would only have to get drunk, or appear to get drunk, beforehand, and then he could affirm or repudiate as he chose. Hence the mere fact that, when a contract, in itself fair, was executed, one of the parties was under the influence of stimulants, does not avoid it.<sup>1</sup>

§ 119. Between drunkenness when set up as a defence to an indictment for crime, and drunkenness when set up as avoiding a contract made under its effects, the legal relations are very different. In the first case it is properly held that to the fact of guilt drunkenness is no defence, though it may be shown for the purpose of lowering the grade. He who voluntarily becomes drunk, voluntarily

Otherwise  
in case of  
fraud.

<sup>1</sup> *Cooke v. Clayworth*, 18 Ves. 12; *Moss v. Tribe*, 3 F. & F. 297; *Mathew v. Baxter*, L. R. 8 Exch. 132; *Pittenger v. Pittenger*, 3 N. J. Eq. 156; *Johns v. Fritchey*, 39 Md. 258; *French v. French*, 8 Ohio, 214; *Henry v. Ritnour*, 31 Ind. 136; *Bates v. Ball*, 72 Ill. 108; *Belcher v. Belcher*, 10 Yerg. 121; *Miller v. Finley*, 26 Mich. 249; *Schramm v. O'Connor*, 98 Ill. 539; *Pickett v. Sutter*, 5 Cal. 412. To the same effect see authorities cited in 1 Wh. & St. Med. Jur. § 16 a; *Burroughs v. Richman*, 13 N. J. L. 233; *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Mansfield v. Watson*, 2 Iowa, 111; *Cummings v. Henry*, 10 Ind. 109; *Joest v. Williams*, 42 Ind. 565; *Broadwater v. Darne*, 10 Mo. 277; *Eaton v. Perry*, 29 Mo. 96; *Keough v. Foreman*, 33 La. An. 1434. As holding to a strict rule, see *Foot v. Tewksberry*, 2 Vt. 97; *Caulkins v. Fry*, 35 Conn. 170; *Drummond v. Hopper*, 4 Harring. 327; *Jenners v. Howard*, 6 Blackf. 240; *Fitzgerald v. Reed*, 9 S. & M. 94. That notorious habitual drunkenness incapacitates, see *Klohs v. Klohs*, 61 Penn. St. 245. In *State Bk. v. McCoy*, 69 Penn. St. 204, it was held that drunkenness of the maker of a note would not be a defence against a *bona fide* endorsee for value. See *S. P. McSparren v. Neeley*, 91 Penn. St. 17; *Miller v. Finley*, 26 Mich. 249; and see to same effect *Caulkins v. Fry*, 35 Conn. 170. As holding contracts of drunkards voidable only when the drunkenness is such as to produce incapacity or to subject the party to fraud on the other side, see *Walker v. Davis*, 1 Gray, 506; *Van Wyck v. Brasher*, 81 N. Y. 260; *Burroughs v. Richman*, 13 N. J. L. 233; *Johns v. Fritchey*, 39 Md. 258; *Cummings v. Henry*, 10 Ind. 109; *Joest v. Williams*, 42 Ind. 565; *Bates v. Ball*, 72 Ill. 108; *Mansfield v. Watson*, 2 Iowa, 111; *Broadwater v. Darne*, 10 Mo. 277; *Eaton v. Perry*, 29 Mo. 96; *Cavender v. Waddingham*, 5 Mo. Ap. 457; *Phelan v. Gardner*, 43 Cal. 306. A contract voidable from the drunkenness at the time of one of the parties may be subsequently ratified. *Infra*, § 122.

brings upon himself the penal consequences of drunkenness. The same rule applies to the drunkard's liability for torts. But it is generally otherwise when a party is sued on a contract made by him when so stupidly drunk as to exhibit his incapacity to those dealing with him. It is true that we can conceive of a latent phase of drunkenness which may not so exhibit itself. There are undoubtedly stages in intoxication, also, to which we could not assign incapacity without assigning it to other cases of exhilaration, and without, therefore, preposterously extending the limits of incapacity. But on the other hand, a contract made by a man when obviously so drunk as to be incapable of rational action, will not be enforced against him when on its face unfair. Such a contract must be inferred to have been fraudulently obtained; and, hence, its performance will not be enforced by the courts.<sup>1</sup> At the same time, if a contract made when drunk is ratified when sober, it binds the party so ratifying.<sup>2</sup> As a general rule, therefore, courts of equity will relieve against contracts entered into in a state of intoxication: (1) where the intoxication produced mental incapacity; and (2) where it produced mental excitement, subjecting the party to the undue influence of the other contracting party, who thereby gains an unfair advantage.<sup>3</sup>

§ 120. As is shown in the kindred case of ratification on

<sup>1</sup> *Pitt v. Smith*, 3 Camp. 33; *Cory v. Cory*, 1 Ves. Sen. 19; *Say v. Barwick*, 1 Ves. & B. 196; *Gore v. Gibson*, 13 M. & W. 623; *Cooke v. Clayworth*, 18 Ves. 12; *Bliss v. R. R.*, 24 Vt. 424; *Mitchell v. Kingman*, 5 Pick. 431; *Rice v. Peet*, 15 Johns. 503; *Wager v. Reid*, 3 T. & C. (N. Y.) 332; *Hutchinson v. Tindell*, 2 Green, Ch. (3 N. J. Eq.) 357; *Burroughs v. Richman*, 1 Green, N. J. 233; *Campbell v. Spencer*, 2 Binn. 133; *Wilson v. Bigger*, 7 Watts & S. 111; *Dulany v. Green*, 4 Harring. Del. 285; *Johns v. Fritchey*, 39 Md. 258; *Menkins v. Lightner*, 18 Ill. 282; *Scanlan v. Cobb*, 85 Ill. 296; *Henry v. Ritenour*, 31 Ind. 136; *Mansfield v. Watson*, 2 Iowa, 111; *Jones v. Perkins*, 5 B. Mon. 225; *Richardson v. Strong*, 13 Ired. L. 106; *Morrison v. McLeod*, 2 Dev. & B. Eq. 226. In *Pitt v. Smith*, 3 Camp. 33, Lord Ellenborough went so far as to hold that intoxication incapacitates a party from contracting, but this must be understood as meaning intoxication to an extent which makes it a fraud in the other contracting party.

<sup>2</sup> *Gore v. Gibson*, 13 M. & W. 623; *Matthews v. Baxter*, L. R. 8 Exch. 132. *Infra*, § 120.

<sup>3</sup> *Wigglesworth v. Steers*, 1 Hen. & Munf. 70; *Birdsong v. Birdsong*, 2 Head, 289; *Belcher v. Belcher*, 10 Yerg. 121;

arriving at full age,<sup>1</sup> ratification may be inductively shown from all the circumstances of the case. Hence, retention by a party when sober, of things bought by him when drunk, is to be regarded a ratification of the bargain.<sup>2</sup> The bargain is in itself only voidable, like the bargains of infants, and is open to subsequent ratification by a party *capax negotii*.<sup>3</sup> Even executory contracts may be thus ratified: "It has been argued that a contract made by a person who was in the position of the defendant, is absolutely void. But it is difficult to understand this contention. For, surely, the defendant, upon coming to his senses, might have said to the plaintiff, 'true, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it.' And if the defendant could say this, there must be a reciprocal right in the other party."<sup>4</sup>

Ratification to be inductively shown.

§ 121. A drunkard, as is the case with lunatics and infants, is liable for necessities sold him; though the action in such cases should be for goods sold and delivered, and not for an account stated, or for goods bargained and sold.<sup>5</sup> The creditor is entitled to recover from

No defence in an action for necessities.

French v. French, 8 Ohio, 214; Mansfield v. Watson, 2 Iowa, 111, at p. 115. But that equity will only relieve where fraud has been practised, and not otherwise, see Hutchinson v. Brown, 1 Clarke Ch. 408; Prentice v. Achorn, 2 Paige, 30; Wager v. Reid, 3 T. & C. (N. Y.) 332; Seymour v. Delancy, 3 Cowen, 445; Pittenger v. Pittenger, 3 N. J. Eq. 156; Hutchinson v. Tindall, 3 N. J. Eq. 357; Jones v. Perkins, 5 B. Mon. 222; Scanlan v. Cobb, 85 Ill. 296, at p. 298; White v. Cox, 4 Hayw. (Tenn.) 213; Campbell v. Ketcham, 1 Bibb, 406; Rutherford v. Ruff, 4 Desaus. 350; Johnson v. Medlicott, 3 P. Wms. 130; Shaw v. Thackray, 3 Sm. & G. 537.

<sup>1</sup> *Supra*, § 58.

<sup>2</sup> Gore v. Gibson, 13 M. & W. 623; Joest v. Williams, 42 Ind. 565; Rich-

ardson v. Strong, 13 Ired. 106; Williams v. Inabnet, 1 Bailey, 343.

<sup>3</sup> Matthews v. Baxter, L. R. 8 Ex. 132; Barrett v. Buxton, 2 Aik. 169; Seymour v. Delancy, 3 Cow. 445; Dorr v. Munsell, 13 Johns. 430; Taylor v. Patrick, 1 Bibb, 168; Fitzgerald v. Reed, 9 S. & M. 94.

<sup>4</sup> Kelly, C. B., Matthews v. Baxter, L. R. 8 Ex. 133, and see other cases, *supra*, § 118.

<sup>5</sup> Cooke v. Clayworth, 18 Ves. 15; Gore v. Gibson, 13 M. & W. 623; Pitt v. Smith, 3 Camp. 33; Sawyer v. Luf-ton, 56 Me. 309; Kendell v. May, 10 Allen, 59; Seymour v. Delancy, 3 Cow. 445; Prentice v. Ahorn, 2 Paige, 30; Vanhorn v. Hann, 39 N. J. L. 207; Jenners v. Howard, 6 Blackf. 240; Darby v. Cabarme, 1 Mo. Ap. 126; Jones v. Perkins, 5 B. Mon. 228.

the drunkard, "when sober, for necessities supplied to him when drunk."<sup>1</sup>

Legal ex- § 122. As necessities may be regarded the ex-  
penses may penses of suits involving the protection of the drunk-  
be neces- ard and of his estate.<sup>2</sup>  
saries.

§ 123. An inquisition of lunacy is not conclusive of lunacy  
in a contest between the alleged lunatic and third  
parties to test the validity of the lunatic's contracts.  
Inquisition *prima facie* But the inquisition is admissible as *prima facie* evi-  
*prima facie* evidence. dence.<sup>3</sup> The same rule applies to inquisitions in cases of  
drunkenness.<sup>4</sup>

<sup>1</sup> Pollock, C. B., *Gore v. Gibson*, 13 M. & W. 623; adopted in Benj. on Sales, 3d Am. ed. § 30, citing *McCrillis v. Bartlett*, 8 N. H. 569; *Richardson v. Strong*, 13 Ired. L. 106.

<sup>2</sup> *Meares in re*, L. R. 10 Ch. D. 552; *Williams v. Wentworth*, 5 Beav. 325; *Hallet v. Oakes*, 1 Cush. 296; *supra*, §§ 71, 92.

<sup>3</sup> *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Dane v. Kirkwall*, 8 C. & P. 683; *Frank v. Frank*, 2 M. & Rob. 315; *Dexter v. Hall*, 15 Wal. 9; *Sawyer v. Lufkin*, 56 Me. 308; *Stone v. Damon*, 12 Mass. 488; *Hamilton v. Hamilton*, 10 R. I. 538; *Hoyt v. Adey*, 3 Lans. 173; *Hart v. Deamer*, 6 Wend. 497; *Banker v. Banker*, 63 N. Y. 409; *Gangwere's Est.*, 14 Penn. St. 417; *McCreight v. Aiken*, 1 Rice, 56. As assigning greater conclusiveness see *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169. In *Leonard v. Leonard*, 14 Pick. 280, it was said that "as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all." See *L'Amoureux v. Crosby*, 2 Paige, 422. *Cf.* Wh. on Ev. § 1254; *Leggate v. Clark*, 111 Mass. 308.

<sup>4</sup> *Leonard v. Leonard*, 14 Pick. 280; *Wadsworth v. Sharpsteen*, 8 N. Y. 388; *Klohs v. Klohs*, 61 Penn. St. 245. In *Blakely v. Blakely*, 33 N. J. Eq. 502, it is intimated that by inquisition capacity to do business is determined; and see *Tozer v. Saturlee*, 3 Grant, Penn. 162. In *Van Deusen v. Sweet*, 51 N. Y. 378, it was held that an inquisition to the effect that a grantor at the time of the execution of a deed was *non compos mentis*, is only *prima facie* proof of incompetency; and this was followed, as to marriage, in *Banker v. Banker*, 63 N. Y. 409. *Supra*, § 113. And see *Goodell v. Harrington*, 3 T. & C. 345. In *L'Amoureux v. Crosby*, 2 Paige, 422, the chancellor said: "As to acts done by a lunatic or drunkard, before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. But all gifts of the goods and chattels of the idiot, lunatic, or drunkard, and all bonds or other contracts made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted to assume the control of his property by the court, are utterly void." See article in 16 Alb. L. J. 292, S. P.; *Breed v. Pratt*,



§ 124. In several European states, as is elsewhere shown,<sup>1</sup> process is given by which persons shown to be irreclaimable spendthrifts are put under the charge of guardians, and decreed to be divested of business capacity. Similar statutes have been enacted in some of the states of the American Union. But a decree to this effect does not avoid the spendthrift's contracts for necessities furnished him.<sup>2</sup> And such statutes have no extra-territorial force.<sup>3</sup> In most jurisdictions the object of the procedure is to prevent the party from being chargeable to the town; and the application in such cases must come from the town authorities. The effect of the procedure, under the statutes, is to incapacitate the spendthrift from making contracts (except, as has just been seen, for necessities) which will further impoverish his estate.<sup>4</sup>

Spendthrifts may be incapacitated by statute.

18 Pick. 115; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Hicks v. Marshall*, 8 Hun, 327; *Hutchinson v. Sandt*, 4 Rawle, 234; *Kneedler's App.*, 92 Penn. St. 428. See, as sustaining admissibility of such records, *Dexter v. Hall*, 15 Wallace, 9; *Caulkins v. Fry*, 35 Conn. 170; *Burke v. Allen*, 29 N. H. 106; *L'Amoureux v. Crosby*, 2 Paige, 422; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Wadsworth v. Sherman*, 14 Barb. 169; *Nichol v. Thomas*, 53 Ind. 53; *Elston v. Jasper*, 45 Tex. 409. In

*Lagay v. Marston*, 32 La. Ann. 170, the finding of a commission that a woman was *notoriously* insane was treated as affording the presumption that a party who had previously contracted with her must have been aware of her condition.

<sup>1</sup> Whart. Conf. of Laws, § 122.

<sup>2</sup> *McCrillis v. Bartlett*, 8 N. H. 569.

<sup>3</sup> Whart. Conf. of Laws, § 122.

<sup>4</sup> See 1 Parsons on Contracts, 388; *Smith v. Spooner*, 3 Pick. 229; *Manson v. Felton*, 13 Pick. 206.

## CHAPTER VII.

## CORPORATIONS.

A corporation is an artificial person created to facilitate business, § 127.	Distinction between usurpation of power and exercise of power, § 137.
Corporations can bind themselves by parol, § 128.	Corporation may borrow money and issue negotiable paper, § 138.
Contracts prohibited by charter invalid, § 129.	Parties interested in corporation may enjoin it from acting <i>ultra vires</i> , § 139.
Liable on agents' contracts, § 130.	When contract is executed, party benefiting by it cannot impeach it, § 140.
Liable for agents' fraud, malice, and negligence, § 131.	Corporation may be estopped as to <i>bona fide</i> third parties, § 141.
Liable for <i>de facto</i> officers, § 132.	Distinction between suits against and suits by a corporation, § 142.
Representations of agent bind corporation, § 133.	Municipal charters subject to stricter limitation, § 143.
Document must be duly executed to bind, § 134.	
Can only act within chartered limits, § 135.	
Distinctive practice in this country, § 136.	

§ 127. BUSINESS requiring long and continuous attention could not be effectively conducted if on the death of any one of the parties concerned his share in its control should pass to his legal representatives; nor would parties be willing to take risks in adventures whose insolvency would expose them to the loss not only of the capital they should supply to the common stock, but of their entire estate. Corporations, therefore, which are artificial persons, composed of one or more living individuals, endued, under a distinctive name, with certain business functions and with the capacity of self-perpetuation either permanently or for a limited period,<sup>1</sup> have been recognized as necessary in all civilized jurisprudences ancient and modern;

<sup>1</sup> As to definition, see Leake on Cont. 2d ed. 581; Royal Mail Co. v. Braham, L. R. 2 Ap. Ca. 381.

and to these corporations belong as a class two leading incidents: (1) their members may from time to time die, but their existence and continuous legal capacity are not thereby affected, provided the succession of an adequate corporate number is kept up; (2) while they make themselves liable for any contracts they may enter into, this liability does not, unless extended by statute, or unless there be some personal obligations assumed by the members individually, extend beyond the corporate estate. The corporation, therefore, and the persons comprising it, are in no sense convertible. The members of the corporation are not (with the exceptions just stated) liable for the corporation's debts, or personally compellable to perform its contracts. The corporation does not receive into its membership the legal representatives of its deceased members. It is a distinct existence, localized in the state where it is chartered and has its principal seat, though even a majority of its members may reside elsewhere, and existing, notwithstanding changes in its membership, as long as the state chartering it ordains.<sup>1</sup>—By the Roman law, as well as by our own, a corporation (*Juristische Person*) is invested, within its sphere, with the same contractual capacity as a natural person.<sup>2</sup> Out of its orbit, however, it has no power.<sup>3</sup>

§ 128. A corporation, however, being a purely ideal structure, can only act through its agents. It used to be said that only by contracts which are attested by its seal could it be bound. Its seal, so it was held, is its only mode of articulation; if it does not speak through its seal, it does not speak at all.<sup>4</sup> But this limitation is no longer applied.<sup>5</sup> Within its orbit a corporation may bind

Corporations can bind themselves by parol.

<sup>1</sup> *Louisville, etc., R. R. v. Letson*, 2 How. 497; *Tileston v. Newell*, 13 Mass. 406; *Peabody v. Flint*, 6 Allen, 52; *Weckler v. Bank*, 42 Md. 581; *Straus v. Ins. Co.*, 5 Oh. St. 59.

<sup>2</sup> *Wh. on Agency*, § 57; *Windscheid, Pandekt.* § 58; *Savigny*, ii. 265–74.

<sup>3</sup> *L. 10, de I. F.* (49, 14). That a corporation has no extra-territorial status, see *Wh. Con. of L.* § 105.

<sup>4</sup> 1 *Bl. Com.* 475; *Anson on Contracts*, 45 *Wh. on Agency*, § 58.

<sup>5</sup> *Morawetz on Corp.* § 167; *Smith v. Gas Co.*, 1 A. & E. 526; 3 N. & M. 771; *Gibson v. East India Co.*, 5 Bing. N. C. 262; *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Canal Bridge v. Gordon*, 1 Pick. 297; *Commercial Bank v. Kortright*, 22 Wend. 348; *Christian Church v. Johnson*, 53 Ind. 273; *Sheffield v. Andress*, 56 Ind. 157; *Athens v. Thomas*, 82 Ill. 259.

itself contractually by its agents. And this may be in two ways. In the first place, it may give its agents specific power to do particular things. In the second place, it may appoint particular officers with certain functions, and it is bound by any acts of these officers in performance of these functions.<sup>1</sup> And in all matters essential and incident to the discharge of its corporate duties, it may bind itself, without seal, by specific resolution, by by-laws, as well as by the appointment of officers and servants to perform particular classes of duties.<sup>2</sup> A seal is not necessary for the appointment even of agents to execute documents under seal.<sup>3</sup> Where, how-

<sup>1</sup> *Infra*, § 130; *Kennedy v. Ins. Co.*, 3 Har. & J. 367. As illustrating the positions in the text, may be mentioned *Birmingham Banking Co. ex parte*, L. R. 6 Ch. 83, in which it was held, that a corporation can (unless prohibited) mortgage any part of its property, as well for an existing debt as for a new loan. A corporation, it was said by James, L. J., can "hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing." That a director binds the company when acting as agent, see *Stratton v. Allen*, 16 N. J. Eq. 229.

<sup>2</sup> *Wh. on Agency*, § 59; *Angell & Ames on Corp.* § 284; *Sutton's Hospital*, 10 Co. Rep. 30*b*; *South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 469; *Church v. Gas Light Co.*, 6 Ad. & El. 846; *Nicholson v. Bradfield*, L. R. 1 Q. B. 620; *Wells v. Kingston*, L. R. 10 C. P. 402; *Riche v. Ashbury*, L. R. 9 Ex. 224; *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Fleckner v. Bank U. S.*, 8 Wheat. 338; *Bank U. S. v. Dandridge*, 12 Wheat. 70; *Eureka v. Bailey Co.*, 11 Wall. 488; *Canal Co. v. Knapp*, 9 Pet. 541; *Goodwin v. Screw Co.*, 34 N. H. 378; *Stamford Bk. v. Benedict*, 15 Conn. 445; *Perkins v. Ins. Co.*, 4 Cow. 645; *People v. Mawran*, 5 Denio, 389;

*Chestnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 16; *Berks, etc. Turnpike Road v. Myers*, 6 S. & R. 12; *McMasters v. Reed*, 1 Grant, Penn. 36; *Elysville Co. v. Okisko*, 5 Md. 153; *Banks v. Poitiaux*, 3 Rand. (Va.) 136; *Bank of Chillicothe v. Swain*, 8 Ohio, 257; *Palm v. Ins. Co.*, 20 Ohio, 537; *Cincinnati R. R. v. Clarkson*, 7 Ind. 595; *Board of Education v. Greenbaum*, 39 Ill. 609; *Blunt v. Walker*, 11 Wis. 334; *Buncombe Co. v. McCarson*, 1 Dev. & B. 306; *Buckley v. Briggs*, 30 Mo. 452; *Kiley v. Forsee*, 57 Mo. 390; *Kitchen v. R. R.*, 59 Mo. 514; *Selma v. Mullen*, 46 Ala. 411; *Western Bank v. Gilstrap*, 45 Mo. 419.

According to Sir W. Anson (p. 45), a seal even in England is no longer requisite, *first*, where the rule would defeat the object of the corporation, and *second*, where it would cause great inconvenience; see to same effect, *Baptist Church v. Melford*, 3 Halst. L. 185; *McCullough v. Ins. Co.*, 46 Ala. 376; *Buckley v. Briggs*, 30 Mo. 452.

<sup>3</sup> *Bank U. S. v. Dandridge*, 12 Wheat. 64; *Maine Stage Co. v. Longley*, 14 Me. 444; *Eastman v. Bank*, 1 N. H. 26; *Warren v. Ins. Co.*, 16 Conn. 444; *Burrill v. Nahant Bk.*, 2 Metc. 163; *Com. Bk. v. Kortright*, 22 Wend. 348.

ever, a seal is prescribed by the charter, it must be used;<sup>1</sup> though, as will hereafter be seen, the defect may be cured by estoppel in cases of executed contracts with third parties acting *bona fide*.

§ 129. A contract in express contravention of the charter, or of the legislation under which the corporation comes into existence, is invalid.<sup>2</sup> But it does not follow that because an act is prohibited in a charter it is invalid as against *bona fide* third parties. It may be that the prohibition is purely corrective, as where a penalty by way of a mere fine is imposed upon the exercise of a particular act. If so, the act is not invalid, though the corporation has to pay the penalty of doing it.<sup>3</sup>—Whether, when a prohibition not simply corrective is in a charter or in independent binding legislation, this prohibition makes contracts as to such action void *ab initio*, has been much discussed. In New York such contracts may be only voidable.<sup>4</sup> In New Jersey they are regarded, and with better reason, in all cases in which the prohibition is a matter of public legislation, as from the outset illegal and void.<sup>5</sup> Such, also, is the English rule.<sup>6</sup>—A charter, as will be hereafter seen more fully, is, in case of doubt, to be construed liberally in favor of the grantees.<sup>7</sup>

Contracts prohibited by charter invalid.

<sup>1</sup> Koehler v. Iron Co., 2 Black, 715.

<sup>2</sup> Bank U. S. v. Owens, 2 Pet. 527; Hitchcock v. Galveston, 96 U. S. 351; Harris v. Runnels, 12 How. 79; Whitney v. Bank, 50 Vt. 388; Phil. Loan Co. v. Towner, 13 Conn. 249; Fuller v. Nav. Co., 21 Conn. 559; Hood v. R. R., 23 Conn. 609; Crocker v. Whitney, 71 N. Y. 161; Maryland Hosp. v. Foreman, 29 Md. 524; State Board v. R. R., 47 Ind. 411; Wood v. Caldwell, 54 Ind. 271; Pangborn v. Westlake, 36 Iowa, 546; Hazlehurst v. R. R., 43 Ga. 13; Montgomery v. Plank Road, 31 Ala. 76; Marion Bank v. Dunkin, 54 Ala. 471; and other cases cited Morawetz on Corp. § 40. See *infra*, §§ 135–7. That

in New York, by statute, all banking contracts made by corporations without authority are invalid, see New York Ins. Co. v. Helmer, 77 N. Y. 64.

<sup>3</sup> Farmers' Bank v. Dearing, 91 U. S. 29; Central Bank v. Pratt, 115 Mass. 539.

<sup>4</sup> See Moss v. Averill, 10 N. Y. 460; Whitney Arms Co. v. Barlow, 63 N. Y. 62; and see *infra*, §§ 135–7.

<sup>5</sup> Morris R. R. v. Sussex R. R., 20 N. J. Eq. 542.

<sup>6</sup> Ashbury R. R. v. Riche, L. R. 7 H. L. 653; Morawetz on Corp. § 43.

<sup>7</sup> *Infra*, § 670; Morawetz on Corp. § 154.

§ 130. Since a corporation acts only through agents, it is bound by its agents' contracts when made ostensibly within the range of their office, or when specially authorized by itself, supposing the transaction be not obviously *ultra vires*.<sup>1</sup> But contracts not within the range of the agent's power, and which he is not specially authorized to make, do not bind his principal as against parties who ought to have taken notice of this limitation.<sup>2</sup> A general agent, however, employed to conduct the business of the corporation generally, binds the corporation, if the appointment is consistent with the charter, in all matters within the corporate range.<sup>3</sup>

§ 131. A corporation is also liable for the frauds and deceits of its agents, when acting within their orbit, even though such agents are appointed by parol. Whenever they can contract, they can subject their principals to liability for their deceitful misstatements or malicious misconduct.<sup>4</sup> Hence, a corporation is liable for mali-

<sup>1</sup> Wh. on Agency, §§ 57, 59, 171, 670; Gibson v. East Ind. Co., 5 Bing. N. C. 275; Church v. Gas Co., 6 A. & E. 846; Ferguson v. Wilson, L. R. 2 Ch. 77; Trundy v. Farrer, 32 Me. 225; Smith v. Proprietors, 8 Pick. 178; Merrick v. R. R., 11 Iowa, 74; Seagraves v. Alton, 13 Ill. 366; Rochford R. R. v. Wilcox, 66 Ill. 417.

<sup>2</sup> Wh. on Agency, § 687; Angell & Ames on Corp. ch. 9; U. S. v. City Bank, 21 How. 356; Frankford Bank v. Johnson, 24 Me. 490; Conant v. Bel- lows Falls Co., 29 Vt. 263; Bank v. Steward, 37 Me. 519; Coheco Bank v. Haskell, 51 N. H. 116; Bank of Genesee v. Patchin, 13 N. Y. 309; Pope v. Bank, 57 N. Y. 126; Watson v. Bennett, 12 Barb. 196; Leggett v. Bank, 1 N. J. Eq. 541; Harrisburg Bank v. Tyler, 3 Watts & S. 373; Lamm v. Port Deposit Co., 49 Md. 233; Humphrey v. Mercant. Ass., 50 Iowa, 607; Western Cottage Co. v. Reddish, 51 Iowa, 55; Bank of St. Mary's v. Calder, 3 Strobl. 403; Holt v. Bacon, 25 Miss. 567.

<sup>3</sup> Ibid. Crowley v. Mining Co., 55 Cal. 270; McKieman v. Lemslen, 56 Cal. 61.

<sup>4</sup> *Infra*, § 277; Greene's Brice's Ultra Vires, 425; Angell & Ames on Corp. § 388; Barwick v. Joint Stock Bank, L. R. 2 Ex. 259; Bayley v. R. R., L. R. 7 C. P. 415; 8 C. P. 148; Moore v. R. R., L. R. 8 Q. B. 36; Boling-broke v. Board, L. R. 9 C. P. 575; Edwards v. R. R., L. R. 6 Q. B. D. 287; Houldsworth v. Bank, 5 App. Cas. 317; Butler v. Watkins, 13 Wall. 456; Ferson v. Sanger, 1 W. & M. 136; Thayer v. Boston, 19 Pick. 516; Gloucester Bank v. Salem Bank, 17 Mass. 33; Andrews v. Suffolk Bank, 12 Gray, 461; Kibbe v. Ins. Co., 11 Gray, 163; Goodspeed v. East Haddam Bank, 22 Com. 530; Watson v. Bennett, 12 Barb. 196; Allerton v. Allerton, 50 N. Y. 670; Mundorff v. Wickersham, 61 Penn. St. 87; Tome v. R. R., 39 Md. 36; Carter v. Machine Co., 51 Md. 290; Daly v. Bank, 56 Mo. 94; Madison R. R. v. Norwich, 24 Ind. 457; Indianapolis R. R. v. Anthony, 43 Ind. 183; Scofield v. State, 54 Ga.

cious prosecution<sup>1</sup> and for libel.<sup>2</sup> “As to the difficulty of imputing fraudulent intention to a corporation,” says Mr. Pollock,<sup>3</sup> “which has been thought to be peculiarly great, it may be remembered that no one has ever doubted that a corporation may be *relieved against* fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive; and it is equally necessary, for the purpose of doing justice in both cases, to impute to the corporation a certain mental condition—of intention to produce a belief in the one case, of belief produced in the other—which, in fact, can exist only in the individual mind of the person who is its agent in the transaction. Lord Langdale found no difficulty in speaking of two railway companies as ‘guilty of fraud and collusion,’ though not in an exact sense.<sup>5</sup> However, the members of a corporation cannot, even by giving an express authority in the name of the corporation, make it responsible, or escape from being individually responsible themselves for a wrongful act (as trespass in removing an obstruction of an alleged highway), which, though not a personal wrong, is of a class wholly beyond the competence of the corporation, so that, if lawful, it would not be a corporate act.”<sup>6</sup> A corporation, also, is liable

635; *Western Union Tel. Co. v Eysler*, 2 Col. T. 141; *South R. R. Co. v. Chappell*, 61 Ala. 527; *Factors’ Ins. Co. v. Dry Dock*, 31 La. Ann. 149. That directors are not personally liable in such cases see *infra*, § 277.

<sup>1</sup> *Copley v. Grover*, 2 Woods, 494.

<sup>2</sup> *Maynard v. Ins. Co.*, 34 Cal. 48; 47 Cal. 207; *Vinas v. Ins. Co.*, 27 La. Ann. 367. In the Roman law, municipal corporations, at least, were held not liable in actions charging malicious torts. *Vangerow*, § 55. In L. 15, § 1, *de dolo malo*, Ulpian replies to the question whether such a corporation could be held so responsible by another question: *Quid enim municipes dolo facere possunt?* The *dolus*, in such cases, is imputable to the offending agent. It is true that penalties were imposed on

municipalities, but this was rather politically than judicially, such as has been sometimes the case in England, where municipal charters were forfeited for political offences. But that the members of private corporations were held liable for delicts, see Savigny, Syst. ii. p. 340.

<sup>3</sup> 3d ed. 127.

<sup>4</sup> Citing Lord Blackburn, *Erlanger v. Phosphate Co.*, 3 App. Ca. 1264.

<sup>5</sup> *Solomon v. Laing*, 12 Beav. 382.

<sup>6</sup> *Mill v. Hawker*, L. R. 9 Ex. 309 no judgment on this part of the case (according to Mr. Pollock) being given in Ex. Ch. L. R. 10 Ex. 92. It has been held in Georgia that as directors of a corporation are *quasi* trustees they cannot bind it by a contract to pay usury. *Planters’ Co. v. Johnson*, 62 Ga. 308.

for injuries caused by the negligence of its agents and subalterns when engaged in their official duties. And this liability extends not only to injuries inflicted on parties with whom the agents deal contractually, but to injuries to third parties.<sup>1</sup> It is, therefore, liable for nuisances to third parties, and for so misusing its franchises and property as to injure third parties.<sup>2</sup> A municipal corporation, however, is not liable for the non-exercise of discretionary functions.<sup>3</sup> But while a corporation which puts a work out on contract is not, with certain limitations, liable for the negligence of the contractor,<sup>4</sup> yet if a nuisance be produced incidentally to such work, such nuisance not being authorized by the legislature, the corporation is liable for the damage.<sup>5</sup>

§ 132. Mere informalities in the election and qualification of officers will not invalidate contracts made by such officers so as to defeat suits brought against subsequent receivers or liquidators.<sup>6</sup> A *de facto* officer, no matter how irregular may have been his appointment, can pledge the credit of the corporation to third parties dealing with the corporation in good faith. It is the fault of the stockholders if they permit agents to act for them without due authority or due preliminary check; and if loss ensues from this, the loss should be borne by the party to whose negligence the loss is peculiarly imputable. The stockholders cannot set up as a defence to suits brought against them irregularities which their own vigilance would have prevented.<sup>7</sup>

§ 133. The representations of the agents of a corporation, as to facts of administration distinctively within their knowledge, or as to the performance of formal preliminary conditions by the corporation, bind the corporation to parties with whom it may contract on the basis of such representations.<sup>8</sup> Hence the cashier of a

<sup>1</sup> Wh. on Neg. §§ 250, 271, 798 *et seq.*

<sup>2</sup> Wh. on Neg. §§ 250, 959.

<sup>3</sup> Wh. on Neg. §§ 260, 959 *a.*

<sup>4</sup> Wh. on Neg. §§ 181, 193.

<sup>5</sup> Water Co. v. Ware, 16 Wall. 566.

<sup>6</sup> *Infra*, §§ 140-1.

<sup>7</sup> Mahony v. Mining Co., L. R. 7 H. L. 869; Brady's case, 1 De Gex, J., & S. 488; Sampson v. Bowdoinham, 36 Me. 78.

<sup>8</sup> *Infra*, § 269; Wh. on Agency, § 679; Wh. on Ev. § 1170; Nat. Ex. Co. v. Drew, 2 Macq. 103; Mackay v.



bank binds the bank as to *bona fide* third parties by certifying that a check is good, even though the certificate is untrue, and is in violation of his private instructions from the bank.<sup>1</sup> A cashier may give a certificate of deposit which binds, though untrue.<sup>2</sup> But a representation by an agent of a corporation, such representation being not only without authority, but not within the range of his duties, does not bind his principal.<sup>3</sup> The rule above stated applies generally to fraudulent representations by agents.<sup>4</sup>

§ 134. It must appear, however, from the document itself, that it was meant to bind the corporation. Thus a deed by the treasurer of a corporation, acknowledged to be his "free act and deed," and executed under his "hand and seal," has been held to be his deed, and not that of the corporation.<sup>5</sup> And a statement of official position is mere surplusage, if the party signing the deed speaks in his own name.<sup>6</sup> On the other hand, where the party signing the document obviously means to do so in his capacity as agent, mere formal variances will be disregarded, and the corporation will be held bound.<sup>7</sup> Parol evidence also will be admitted to show that the name signed, though not technically that of the corporation, was adopted by the corporation as its own.<sup>8</sup>—When a seal is required, it must be

Document must be duly executed to bind.

Com. Bk., L. R. 5 P. C. 394; Commissioners v. Aspinwall, 21 How. 539; Merchant's Bk. v. State Bank, 10 Wall. 604; Coloma v. Eaves, 92 U. S. 484; Orleans v. Platt, 99 U. S. 676; Fogg v. Griffin, 2 Allen, 1; Fairfield v. Thorp, 13 Conn. 173; Toll Bridge Co. v. Betsworth, 30 Conn. 380; Bank of Monroe v. Field, 2 Hill, N. Y. 445; Spalding v. Bank, 9 Barr, 28; Stewart v. Huntington Bk., 11 S. & R. 267; Carey v. Giles, 10 Ga. 9; Payne v. Bank, 6 Sm. & M. 24.

<sup>1</sup> Merchant's Bk. v. State Bank, 10 Wall. 604; Farmer's and Mech's Bk. v. Butcher's Bk., 16 N. Y. 727.

<sup>2</sup> Barnes v. Bank, 19 N. Y. 152; Cooke v. Bank, 52 N. Y. 69.

<sup>3</sup> Franklin Bank v. Steward, 37 Me. 519.

<sup>4</sup> *Infra*, § 269.

<sup>5</sup> Brinley v. Mann, 2 Cush. 337. See to same effect, Paice v. Walker, L. R. 5 Ex. 173; Norton v. Herron, 1 C. & P. 648; Freese v. Crary, 29 Ind. 524; Sencerbox v. McGrade, 6 Minn. 484. See fully, *infra*, § 810 a.

<sup>6</sup> Dutton v. Marsh, L. R. 6 Q. B. 361; Collins v. Ins. Co., 17 Oh. St. 215. *Infra*, § 810 a, etc.

<sup>7</sup> Despatch Line of Packets v. Belamy Co., 12 N. H. 205; Melledge v. Iron Co., 5 Cush. 173; Pease v. Pease, 35 Conn. 131.

<sup>8</sup> Melledge v. Iron Co., 5 Cush. 173. In Minot v. Curtis, 7 Mass. 444, the

the formal seal of the corporation that is used.<sup>1</sup>—As is elsewhere shown, corporate action, when on its face adequate and conformable to the charter, will be presumed to have been regular.<sup>2</sup>

§ 135. A corporation can only bind itself contractually within its chartered limits. A banking corporation, for instance, chartered to do banking, cannot, without specific additional powers from the sovereign, bind itself by contracts of common carriage; nor can a manufacturing company without such powers go into the mining business. The corporation, in other words, cannot be bound to any act not appertaining to the proper exercise of the functions it was created to perform.<sup>3</sup> When a corporation is chartered for a specific purpose, then all contracts which are not incidental to such purpose are invalid. The test is not *judiciousness*. Such contracts may, to a dispassionate and intelligent observer, appear wise. The test is, is the contract incidental to the discharge of the functions the corporation was chartered to perform? If not, it is on its face invalid;<sup>4</sup> while otherwise it would be valid.<sup>5</sup> “A corporation,” so is the rule stated by Gray, C. J., in the Supreme Court of Massachusetts in 1881,<sup>6</sup> “has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the govern-

court said: “We know not why corporations may not be known by several names as well as individuals.” See *infra*, § 810 a.

<sup>1</sup> Horn v. Ivey, 1 Mod. 18; 2 Keb. 567; Koehler v. Iron Co., 2 Black, 715.

<sup>2</sup> *Infra*, § 141; Wh. on Ev. § 1310.

<sup>3</sup> Pollock, 3d ed. 122 *et seq.*; Norwich v. R. R., 4 E. & B. 397; East Anglian R. R. v. E. C. R. R., 11 C. B. 775; Ashbury Co. v. Riche, L. R. 7 H. L. 653; Laing v. Reed, L. R. 5 Ch. 4; Clinch v. Financial Corp., L. R. 4 Ch. 117; Macgregor v. R. R., 18 Q. B. 618; Prince of Wales Co. v. Harding, E. B. & E. 183; Mulliner v. R. R., L. R. 11 Ch. D. 611; R. v. Reed, L. R. 5 Q. B. D. 488; White Valley Co. v. Vallette,

2 How. 424; Old Col. R. R. v. Evans, 6 Gray, 38; and cases cited *infra*.

<sup>4</sup> Colchester v. Lowten, 1 Ves. & B. 245; see Brown v. Winnisimmet Co., 11 Allen, 326; Lynch v. Hartwell, 8 Johns. 422; Curtis v. Leavitt, 15 N. Y. 65; Hood v. R. R., 22 Conn. 502; Vanwickle v. R. R., 2 Green, 162; Stewart's Appeal, 56 Penn. St. 413; Galena v. Corwith, 48 Ill. 423.

<sup>5</sup> Lyndeborough Glass Co. v. Mass. Glass Co., 111 Mass. 315; Ossipee Man. Co. v. Canney, 54 N. H. 295; Hood v. R. R., 22 Conn. 1; Thompson v. Lambert, 44 Iowa, 239; Cent. R. R. v. Collins, 40 Ga. 582.

<sup>6</sup> Davis v. R. R., *infra*, § 137.

ment, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the power conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation." Thus a corporation cannot, without special legislative authority, go into a distinct business, as where a railroad company undertakes buying and selling coal as merchandise,<sup>1</sup> or running an independent line of steamers to a foreign port,<sup>2</sup> or dealing with real estate on speculation.<sup>3</sup> "That which the crown has not granted by express unambiguous terms, the subject has no right to claim under a grant or charter. 'In no species of grant does this rule of construction more especially obtain than in grants which emanate from and operate in derogation of the prerogative of the crown,' *ex. gr.*, where a monopoly is granted."<sup>4</sup> In England it is settled that a corporation can only act contractually within its chartered limits, nor can it employ its franchises and property in any way but that specifically designated by the charter.<sup>5</sup> But a corporation organized for commercial purposes has power to borrow money, unless restricted specially, and for this purpose to mortgage

<sup>1</sup> Atty.-Gen. *v.* Great North. R. R., 1 Dr. & Sm. 154; Eccles. Commis. *v.* R. R., L. R. 4 Ch. D. 845.

<sup>2</sup> Colman *v.* R. R., 10 Beav. 1.

<sup>3</sup> Carington *v.* Wycombe, L. R. 3 Ch. 377; Leake, 2d ed. 587.

<sup>4</sup> Brown's Leg. Max. 607, citing Feather *v.* R., 6 B. & C. 283; The Rebeckah, 1 Rob. 227.

<sup>5</sup> Southall *v.* Ass. Co., L. R. 11 Eq.

65; Featherstonhaugh *v.* Clay Co., L. R. 1 Eq. 318; Horsey's case, L. R. 5 Eq. 561; Holmes *v.* Newcastle Abattoir Co., L. R. 1 Ch. D. 682; Ashbury R. R. Carriage Co. *v.* Riche, L. R. 7 H. L. 653; Hope *v.* Financial Society, L. R. 4 Ch. D. 327; London and Provincial Coal Co. *in re*, L. R. 5 Ch. D. 525; White *v.* R. R., 1 H. & M. 786; Cork, etc., R. R. *in re*, L. R. 4 Ch. 748.

its property,<sup>1</sup> and to draw and accept commercial paper, if it be authorized to do trading business.<sup>2</sup> It is, however, conceded in England that the acts of a corporation within its chartered sphere are to be considered as *prima facie* authorized; and this presumption is liberally applied to whatever may be regarded as conducive to the protection of the interests the corporation was chartered to promote. If it is acting apparently for the purposes of its creation, the burden is on it, should it afterwards attempt to disavow its acts, to show that they were *ultra vires*.<sup>3</sup>

<sup>1</sup> Leake, 2d ed. 585; Australian Clipper Co. v. Mounsey, 4 K. & J. 733; Patent File Co. *in re*, L. R. 6 Ch. 83; Shears v. Jacob, L. R. 1 C. P. 513; Anglo Danubian St. Co. *in re*, L. R. 20 Eq. 339; Campbell's case, L. R. 4 Ch. D. 470.

<sup>2</sup> Murray v. East Ind. Co., 5 B. & Ald. 204. *Infra*, § 137.

Lord Cranworth, in Shrewsbury, etc., R. R. v. N. W. R. R., 6 H. L. 135, as adopted by Mr. Pollock (Wald's ed. 104), said: "*Prima facie* corporate bodies are bound by all contracts under their common seal. When the legislature constitutes a corporation, it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case when the contract is one which, from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*. And the question here, as in similar cases, is whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced."

In East. Co. R. R. v. Hawkes, 5 H. L. C. 331, Lord Cranworth said: "It must now be considered as a well-settled doctrine that a company incorporated by act of parliament for a special

purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." And when the legislature prohibits a corporation from entering on a particular line of business, its contracts in this line of business are invalid. Taylor v. R. R., L. R. 2 Ex. 356. And it is laid down "that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, express or implied, that the corporation shall not enter into a particular contract, every court, whether of law or of equity, is bound to treat a contract entered into contrary to the enactment as illegal and therefore void." Blackburn in Riche v. Ashbury R. R. Car. Co., L. R. 9 Ex. 262; adopted in Ashbury R. R. Car. Co. v. Riche, L. R. 7 H. L. 673.

That a corporation can mortgage its property to pay its debts, see People v. Brown, 5 Wend. 590.

The expressions *ultra vires* and *infra vires* are preferred by Lord Cairns as more correct in such cases than "illegal" or "legal." Ashbury R. R. Car. Co. v. Riche, L. R. 7 H. L. 672.

<sup>3</sup> Lindley, op. cit. 266; Pollock, 3d ed. 131.

"As a general rule, corporations can have and exercise only such powers as

§ 136. In the United States, under the shelter of the constitutional provision prohibiting laws impairing the obligation of contracts, corporations, unless the power of amending them be reserved in the charter, possess an immunity from legislative control not enjoyed by them in England; and in view of the fact that charters convey such high prerogatives, we would suppose that they would be subjected to a construction at least as strict as that placed on charters in England. Such, no doubt, is the rule with us in all cases involving a contest between the state granting the charter, and the corporation chartered.<sup>1</sup> Contentions, however, as to chartered limits arise generally between the corporation itself and third parties; and in this relation the tendency of our decisions, so far at least as concerns *bona fide* purchasers without notice, has been to allow corporate action a wider range than in England. This may be attributed to several causes. In England, in the first place, charters of corporations are comparatively rare, are subjected to severe scrutiny before they are passed, and are as cautious and artificial in their limitations as are deeds of settlement between private parties. They may be regarded, therefore, as special powers of attorney, conveying only the authority they specifically describe. In this country, on the other hand, private charters are usually drawn by the representatives of the corporation to be chartered, and are often passed in the terms which these representatives propose. These comprehensive charters create a public sentiment in accordance with which all corporations are supposed to possess

Distinctive  
practice  
in this  
country.

are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties. *Fertilizer Company v. Hyde Park*, 97 U. S. 659; *Salomons v. Laing*, 12 Beav. 339; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 348.

"And it is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all

attempts to do so are void.. *Mechanic's Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *New York and New Haven R. Co. v. Schuyler*, 34 id. 30; *Railway Co. v. Allerton*, 18 Wall. 233; *Stace & Worth's case*, L. R. 4 Ch. 685, note." *Woods, J., Scoville v. Thayer*, Sup. Ct. U. S. 1882.

<sup>1</sup> See Morawetz on Corp. § 642; *People v. Turnpike Co.*, 23 Wend. 193.

the incidental powers which it is notorious that some possess. That a railroad company, for instance, should be supposed to have power to endorse commercial paper is natural in a community in which there are many such companies which have this power expressly given to them; and when such power is largely exercised by corporations of this class, it is natural that it should be supposed to belong to all others.—A second reason is, that in this country, charters are now largely granted under general laws, while in England, they are always the creatures of special legislation. In England the grant is only what is given by the charter, the sovereign reserving all power in the subject matter not specially granted. In most of our American States, large blocks of power, by means of general legislation, are distributed without reservation among certain classes of corporations. Thus, any corporation that desires to do banking business may do so by complying with certain requisites; and the artificial persons coming up to do business under these statutes are entitled to do this business as freely as could natural persons.—In the third place, a corporation, in England, when it is chartered, remains open to revision by parliament, and continues, during its whole existence, to be the creature of parliament; whereas, in this country, under the clause in the federal constitution which provides that no state shall impair the obligation of contracts, a corporation once chartered is an independent power.—In the fourth place, from the very fact of the multitudes of corporations by which the business of the country is conducted, great injury would accrue to the public and to individuals if corporations should be held responsible only on such of their contracts as do not technically transcend their chartered limits.—For these and other reasons, our courts, with but few exceptions, have held that business corporations are entitled to exercise whatever incidental powers would be exercised by natural persons doing the same kind of business under general powers of attorney. If an agent, under a general power of attorney, can issue negotiable paper, or can pledge assets, or can take or grant leases, so can a corporation. And if a corporation exceeds its powers, it can only be called to account in two ways. The first is by injunction by its members, which will presently be

noticed. The second is by proceedings of ouster and dissolution by the sovereign. So far as concerns *bona fide* purchasers, its contracts within the above limits are legal, even though at the first view *ultra vires*, and it is estopped from setting up their illegality.<sup>1</sup> Any contract, however, by such a corporation, designed to pervert the trust of which it is the agent, and of such a character that its inconsistency with the object for which the corporation is designed is transparent, is illegal.<sup>2</sup>

§ 137. An important distinction is to be noticed between the usurpation by a corporation of powers not conferred on it by charter, and a misuse of powers which the charter confers; between, in other words, “the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting parties.”<sup>3</sup> In the former case the corporation is not bound by its agents’ contracts; in the latter case it is so bound.<sup>4</sup>—If a general power to exercise a specific franchise

Distinction between usurpation of power and misuse of power.

<sup>1</sup> Union Nat. Bank *v.* Matthews, 98 U. S. 621; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Oil Creek R. R. *v.* Penn. Trans. Co., 83 Penn. St. 160; Culver *v.* Reno Real Est. Co., 91 Penn. St. 367; Hays *v.* Galion, 29 Ohio St. 330; State Board of Agr. *v.* R. R., 47 Ind. 407; St. Joseph’s Ins. Co. *v.* Hauck, 71 Mo. 465.

<sup>2</sup> Thomas *v.* R. R., 101 U. S. 71; Bissell *v.* R. R., 22 N. Y. 285; Black *v.* Canal Co., 22 N. J. Eq. 130. That action of a corporation *ultra vires* may be cured by subsequent legislation, see Morawetz on Corp. § 31. In Mahoney Mining Co. *v.* Bank, Sup. Ct. U. S. 1882 (21 Am. Law Reg. 101), it was held that, where a mining corporation, by its charter, had power to raise money for use in its corporate business,

and in the ordinary course of its business overdraw through its officers its account in bank, it will be presumed that these officers had power to make an overdraft, and that in making it, not only they did not exceed their authority, but the moneys thus obtained were paid over to or received by the company.

<sup>3</sup> Gray, C. J., Davis *v.* R. R., S. C. Mass. 1881.

<sup>4</sup> Coleman *v.* R. R., 10 Beav. 1; Bagshaw *v.* R. R., 7 Hare, 114; East Anglian R. R., 11 C. B. 775. The recent cases are thus grouped by Gray, C. J., in Davis *v.* R. R., S. Ct. Mass. 1881:—

“In Ashbury Railway Carriage and Iron Co. *v.* Riche, L. R. 7 H. L. 653, and L. R. 9 Ex. 224, the objects for which a company, registered under the

is given, this, such is the prevalent view, implies a power to do all acts incidental to a proper exercise of such franchise.

English joint stock companies act of 1862, was created, were stated in its memorandum of association to be, 'to make and sell or lend on hire railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease, work, and sell mines, minerals, land, and buildings; to purchase and sell, as merchants, timber, coal, metals, or other materials, and to buy and sell any such materials on commission or as agents.' The directors agreed to purchase a concession for making a railway in a foreign country, and afterwards (on account of difficulties existing by the law of the country) agreed to assign the concession to an association formed there, which was to supply the materials for the construction of the railway, and to receive periodical payments from the English company. In an action at law brought by the foreign associates against the English company upon this agreement, it was held in the lower courts, as well as in the House of Lords, to be *ultra vires*. The judges below were divided upon the question whether it had been ratified by the stockholders so as to bind the company. But in the House of Lords it was unanimously held, by Lord Chancellor Cairns and Lords Chelmsford, Hatherley, O'Hagen, and Selborne, that the contract was not within the scope of the memorandum of association, and was, therefore, void and incapable of being ratified, and the action could not be maintained. Lord Selborne said: 'The action in this case is brought upon a contract, not directly or indirectly to execute any works, but to find capital for a foreign railway

company, in exchange for shares and bonds of that company. Such a contract, in my opinion, was not authorized by the memorandum of association of the Ashbury Company. All your lordships, and all the judges in the courts below, appear to be, so far, agreed. But this, in my judgment, is really decisive of the whole case. I only repeat what Lord Cranworth, in *Hawkes v. Eastern Counties Railway Company* (when moving the judgment of this house), stated to be settled law, when I say that a statutory corporation, created by act of parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that act. The present and all other companies, incorporated by virtue of the companies act of 1862, appear to me to be statutory corporations within this principle. The memorandum of association is under that act their fundamental, and (except in certain specified particulars) their unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. The object and policy of those provisions of the statute which prescribe the conditions to be expressed in the memorandum, and make these conditions (except in certain points) unalterable, would be liable to be defeated if a contract under the common seal, which on the face of it transgresses the fundamental law, were not held to be void, and *ultra vires* of the company, as well as beyond the power delegated to its directors or administrators. It was so held in the case of *East Anglian Railway Company*, and in other cases upon railway acts, which cases were approved by this house in *Hawkes' case*; and I am unable to see



It is true that the same conflict of opinion exists on this question as exists on the parallel question of the bestowal of

any distinction for this purpose between statutory corporations under railway acts, and statutory corporations under the joint stock companies' act of 1862.' 'I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do. This being so, it necessarily follows (as indeed seems to me to have been conceded in Mr. Justice Blackburn's judgment) that, where there could be no mandate, there cannot be any ratification; and that the assent of all the shareholders can make no difference when a stranger to the corporation is suing the company itself in its corporate name, upon a contract under the common seal. No agreement of shareholders can make that a contract of the corporation, which the law says cannot and shall not be so.' L. R. 7 H. L. 693-695.

"In the very recent case of Attorney General v. Great Eastern Ry., 5 App. Cas. 473, 478, in which the contract in question was held to be expressly authorized by the terms of the act of parliament, and, therefore, not *ultra vires*, Lord Chancellor Selborne, while expressing the opinion that 'this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be re-

garded as incidental to, or consequential upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*,' declared his sense of the importance of maintaining the doctrine of *ultra vires*, as explained in the case of Ashbury Railway Carriage and Iron Co. v. Riche. And Lord Blackburn said: 'That case appears to me to decide at all events this, that where there is an act of parliament creating a corporation for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by act of parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose;' although he also agreed 'that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited.' 5 App. Cas. 481.

"These statements are the more significant, because Baron Bramwell, in the same case below (11 Ch. D. 449, 501-503), had cast doubts upon the correctness of the decision in the case of East Anglian Ry. v. Eastern Counties Ry.; and Lord Blackburn himself, when a justice of the court of queen's bench, had more than once approved Baron Parke's form of stating the doctrine. Chambers v. Manchester, etc. Ry., 5 B. & S. 588, 610; Taylor v. Chichester, etc. Ry., L. R. 2 Ex. 356, 384; Riche v. Ashbury Railway Carriage & Iron Co., L. R. 9 Ex. 264.

"The same principles have been

political powers under the Constitution of the United States. On the one side, the extreme position may be taken that the

clearly and positively enunciated in two unanimous judgments of the supreme court of the United States.

"In *Pearce v. Madison, etc. Ry.*, 21 How. 441, two corporations, created by the laws of Indiana to construct distinct, though connecting, lines of railroad in that state, were consolidated by agreement, and conducted the business of both lines under a common board of management, which gave notes in the name of the consolidated company in payment for a steamboat, which was to be employed on the Ohio river to run in connection with the railroads. After the execution of the notes and the acquisition of the steamboat, this relation between the corporations was legally dissolved. It was held, that an action brought by an indorsee against the two corporations upon the notes could not be maintained.

"Mr. Justice Campbell, in delivering judgment, said: 'The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana, under which they were organized, and reference must be had to these, to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But, in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection

with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils for which they afforded no sanction. Now persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority.'

"He then referred with approval to the cases of *Colman v. Eastern Counties Ry.*, *East Anglican Rys. v. Eastern Counties Ry.*, and *Macgregor v. Dover, etc. Ry.*, above cited, and added: 'It is contended that, because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an indorsee; and the only question is, Had the corporation the capacity to make the contract, in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.' Judgment was rendered for the defendants. It is to be observed that in that case there was no suggestion that the plaintiff took the notes sued on without notice of the illegality in the original consideration, which would have presented a different question. *Lexington v. Butler*, 14 Wall. 282; *Macon v.*

grant of a franchise, or of a political prerogative, is to be construed as giving only the powers the words themselves convey.

Shores, 97 U. S. 272; Monument Bank v. Globe Works, 101 Mass. 57.

"In *Thomas v. Railroad Co.*, 101 U. S. 71, a railroad corporation, without authority of the legislature, leased its railroad to three persons for twenty years, for the consideration of one-half of the gross sums collected from the operation of the road by the lessees during the term, reserving the right at any time to terminate the contract and retake possession of the road, paying such damages for the value of the unexpired term as should be determined by arbitration. At the end of five years the corporation resumed possession, and the accounts for that period were adjusted and paid. It was held that no action could be maintained against the corporation to recover the value of the unexpired term. The opinion was delivered by Mr. Justice Miller.

"It was argued by counsel for the plaintiffs in that case, that though there was nothing in the language of the charter which authorized the making of this agreement, yet 'a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter, a stockholder may enjoin its execution; and the state may, by proper process, forfeit the charter.' But the court said: 'We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is

expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.' The court, then, after referring to some of the English cases above cited, and particularly to the decision of the House of Lords in *Ashbury Railway Carriage & Iron Co. v. Riche*, as establishing 'the broad doctrine that a contract not within the scope of the powers conferred on the corporation, can not be made valid by the assent of every one of the shareholders; nor can it by any partial performance become the foundation of a right of action,' expressed the opinion that that decision 'represents the decided preponderance of authority, both in this country and in England, and is based upon sound principle.'

"The court further said: 'There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract. That principle is that, where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against

On the other side, the equally extreme position is taken, that a grant of a franchise, or of a political prerogative, involves a

public policy.' This proposition is supported by the cases there cited, and by many others. See *Richardson v. Sibley*, 11 Allen, 65, 67; *Whittenton Mills v. Upton*, 10 Gray, 582; *Proprietors of Locks and Canals v. Nashua, etc. R. Co.*, 104 Mass. 1; *Middlesex Railroad v. Boston, etc. R. Co.*, 115 Mass. 347. But that the decision was not intended to be put exclusively upon this ground, is manifest from the terms in which it was introduced, as well as from those in which the general doctrine has been already laid down, and from the concluding sentence of the opinion.

"The judgments of the English courts, and of the Supreme Court of the United States, to which we have referred, do but affirm and apply principles long ago declared by this court.

"More than fifty years since, Chief Justice Parker said: 'The power of corporations is derived only from the act, grant, charter, or patent by which they are created. In this Commonwealth the source and origin of such power is the legislature, and corporations are to exercise no authority except what is given by express terms or by necessary implication by that body. No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators.' *Salem Milldam v. Ropes*, 6 Pick. 23, 32. And the importance, for the security of the rights of each stockholder, of a steady adherence to the principle that 'corporations can only exercise their powers over their respective members for the accomplishment of limited and well-defined objects,' was strongly stated

by Chief Justice Shaw in 1839. *Spaulding v. Lowell*, 23 Pick. 71, 75.

"As was observed in *Morville v. American Tract Society*, 123 Mass. 129, 136, 'The power to make all such contracts as are necessary and usual in the course of business, or are reasonably incident to the objects for which a private corporation is created, is always implied where there is no positive restriction in the charter.' Thus a corporation may let or mortgage property lawfully held by it under its charter, and not immediately needed for its own business. *Simpson v. Westminster Hotel Co.*, 8 H. L. Cas. 712; *Brown v. Winnisimmet Co.*, 11 Allen, 326; *Hendee v. Pinkerton*, 14 Allen, 381. A corporation established 'for the purpose of manufacturing and selling glass' may contract to purchase glassware from a like corporation to keep up its own stock and supply its customers while its works are being put in repair. *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315. A corporation authorized to purchase and hold water power created by the erection of dams, and to hold real estate, may, when the water power has been lawfully extinguished, sell its lands, and as part of the contract of sale agree to raise their grade. *Dupee v. Boston Water Power Co.*, 114 Mass. 37. A railroad corporation may agree to transport as a common carrier over connecting railroads goods intrusted to it for carriage over its own line. *Hill Manufacturing Co. v. Boston, etc. Ry.*, 104 Mass. 122; *Railway Co. v. McCarthy*, 96 U. S. 258. And it cannot dispute its liability for goods delivered to it to be carried over a railroad of which it

grant of whatever powers the grantee may find it expedient to invoke to utilize such franchise or prerogative. An intermediate position, however, may be found; and towards this the courts are inclined to gravitate. On the one side, it is

is in actual possession and use under a lease, on the ground that the lease is void. *McCluer v. Manchester, etc. Ry.*, 13 Gray, 124."

In *Davis v. R. R.* above cited, the action was brought upon the following agreement, signed by the Old Colony Railroad Company, in the sum of \$6000, and by the Smith American Organ Company in the sum of \$5000, and by other corporations, partnerships, and individuals in various sums, amounting in all to more than \$200,000.

"Boston, January 23, 1872. We, the undersigned subscribers, hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June, and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed; provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto." It was held that this contract, so far as concerns the Old Colony Railroad Company, was neither a necessary nor appropriate means of carrying on its business, and was *ultra vires*, and could not bind it by reason of benefit to be derived from possible increase of pas-

sengers over its road. That parties are bound to take notice of limitations in public charters, see *Franklin Co. v. Lewiston Savings Inst.*, 68 Me. 43.

"Where a private corporation has authority to issue negotiable securities, such instruments, when issued, possess the legal character ordinarily attaching to negotiable paper, and the holder in good faith, before maturity, and for value, may recover even though in the particular case the power of the corporation was irregularly exercised or was exceeded; or to state the legal proposition in its application to this case: this defendant having power to incur debts to a limited extent, and to issue its negotiable notes therefor, this plaintiff, as a *bona fide* holder of the notes in suit, may recover upon it although in this particular case the indebtedness of the corporation at the time of giving this note already exceeded the limits prescribed by its articles of association. *Stoney v. Am. Life Ins. Co.*, 11 Paige, 635; *McIntire v. Preston*, 10 Ill. 48; *Monument. Nat. Bank v. Globe Works*, 101 Mass. 57; *Bissell v. Mich. Sou.*, etc., R. Co., 22 N. Y. 289; *Lexington v. Butler*, 14 Wall. 282; *Moran v. Miami Co.*, 2 Black, 722; *Ang. & Ames Corp.* (10th ed.) 268; *Field on Corp.* 303; *Green's Brice's Ultra Vires*, 273-74, 729. Although in such a case, the corporation or its officers exceeded the corporate authority, and its contract would be hence in a sense *ultra vires*, yet other legal principles besides those merely relating to the powers of the corporation come in to affect the result." *Auerbach v. Mill Co.*, Sup. Ct. Minn. 1881, 13 Reporter, 51.

absurd to say that the grantee of a franchise or power cannot perform acts without which the grant would be inoperative. On the other side, it would be equally absurd to say that a grant for a special purpose conveys to the grantee unlimited power to do whatever he chooses in working the grant. The proper view is, that a grant conveys all powers which in the ordinary acceptation of the particular line of business are necessary to its due exercise.<sup>1</sup> But this is subordinate to the terms used in the charter, which is to be subjected to rules of construction hereafter to be distinctively noticed.<sup>2</sup> It may, however, be particularly observed, that while a general grant conveys whatever powers are, in ordinary business acceptation, necessary to its exercise, it is otherwise when the grant, after the general terms of bestowal, goes on to specify certain modes in which the power is to be exercised. Such a specification operates as a limitation to the particular lines of exercise. *Expressio unius est exclusio alterius*.<sup>3</sup>—Formalities prescribed under a charter as requisites to a corporate act are not to be regarded as essential prerequisites of a valid exercise of power. Hence, though a charter requires that the contracts of a corporation should be executed by it in a particular form, the corporation is bound by contracts executed by it in another form, in all cases in which it has enjoyed the benefit of such contracts, and when no exception was taken at the time by the parties interested.<sup>4</sup>

§ 138. A corporation is entitled to borrow money when this is necessary to enable it to exercise the franchises of its charter; and the right to borrow includes the right to give written acknowledgments of debt.<sup>5</sup> If a corporation is restricted by its charter.

Corporation may borrow money and issue negotiable paper.

<sup>1</sup> See 2 Kent's Com. 298-9.

<sup>2</sup> *Infra*, §§ 627 *et seq.*

<sup>3</sup> *Infra*, § 674; Ashbury R. R. v. Riche, L. R. 7 H. L. 653; At. Gen. v. R. R., L. R. 5 Ap. Ca. 481; R. v. Reed, L. R. 5 Q. B. D. 488.

<sup>4</sup> Davis v. R. R., *ut supra*; Zabriskie v. R. R., 23 How. 381; Bulkley v. Fishing Co., 2 Conn. 252; Bank of Northern Liberties v. Cresson, 12 S. & R. 306.

<sup>5</sup> Internat. Life Ass. Co. *in re*, L. R. 10 Eq. 312; Fay v. Noble, 12 Cush. 1; Partridge v. Badger, 25 Barb. 146; Clark v. Titcomb, 42 Barb. 122; Nelson v. Eaton, 26 N. Y. 410; Lucas v. Pitney, 3 Dutch. 221; Bank of Chillicothe v. Chillicothe, 7 Ohio, 354; Tucker v. Raleigh, 75 N. C. 267; Craven v. R. R., 77 N. C. 289; Oxford Co. v. Spradley, 46 Ala. 98; Alabama Ins.

ter from issuing paper beyond a certain limit, it is not bound, unless by way of estoppel, for its issues beyond such limit.<sup>1</sup> But this refers to loans in their formal sense. Such a limitation does not preclude the corporation from borrowing money to carry on the ordinary business of the corporation.<sup>2</sup> The right to borrow includes, unless there be a restriction, the right to mortgage.<sup>3</sup> In England the right to issue negotiable paper is limited to those corporations to whose business the issue of such paper is an ordinary incident;<sup>4</sup> and has been denied to mining companies,<sup>5</sup> to gas companies,<sup>6</sup> to cemetery companies,<sup>7</sup> to waterworks companies,<sup>8</sup> and to railway companies.<sup>9</sup> According to Mr. Pollock, a corporation may be bound by negotiable paper issued by it in the following cases: 1. When the issuing of such paper is one of the objects for which the corporation is chartered, as is the case not only with banks, but with "financial companies generally."<sup>10</sup> 2. "When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, etc., on its behalf, either by express words or by necessary implication."<sup>11</sup> In this country it has been laid down that a power to borrow money implies a power to issue negotiable paper as security for money borrowed;<sup>12</sup>

*Co. v. Association*, 54 Ala. 73; *Bradley v. Ballard*, 55 Ill. 413. That negotiability of bonds depends on terms of document, see *infra*, § 797.

<sup>1</sup> *Worcester Com. Exch. Co. in re*, 3 De G. M. & G. 180.

<sup>2</sup> *German Mining Co. in re*, 4 De G. M. & G. 19; *Cork, etc. R. R. in re*, L. R. 4 Ch. 748; *Norwich Yarn Co. in re*, 22 Beav. 143.

<sup>3</sup> *Jones v. Guaranty Co.*, 101 U. S. 622; *Pierce v. Emery*, 32 N. H. 503; *Richards v. R. R.*, 44 N. H. 127; *Curtis v. Leavitt*, 15 N. Y. 9; *Nelson v. Eaton*, 26 N. Y. 410; *Patent File Co. in re*, L. R. 6 Ch. 83; *Shears v. Jacob*, L. R. 1 C. P. 513; *Watt's App.*, 78 Penn. St. 370; *Susquehanna Bridge Co. v. Ins. Co.*, 3 Md. 305; *Burt v. Rattle*, 31 Oh. St. 116; *Aurora Soc. v.*

*Paddock*, 80 Ill. 263; *Burr v. McDonald*, 3 Grat. 215; and other cases cited, *Morawetz on Corp.* § 174.

<sup>4</sup> See *Bateman v. R. R.*, L. R. 1 C. P. 499.

<sup>5</sup> *Brown v. Byers*, 16 M. & W. 252.

<sup>6</sup> *Bramah v. Roberts*, 3 Bing. N. C. 963.

<sup>7</sup> *Steele v. Harmer*, 14 M. & W. 831.

<sup>8</sup> *Broughton v. Waterworks*, 3 B. & Ald. 1.

<sup>9</sup> *Bateman v. R. R.*, L. R. 1 C. P. 499.

<sup>10</sup> *Per Montague Smith, J.*, *Shears v. Jacob*, L. R. 1 C. P. 512; *City Bank ex parte*, L. R. 3 Ch. 758.

<sup>11</sup> *Pollock*, 3d ed. 141-2.

<sup>12</sup> *Police Jury v. Britton*, 15 Wall. 560.

and the general rule is that corporations, in all cases in which the issue of negotiable paper is promotive of the objects of their charter, may be held liable on such paper, either as maker, as drawer, or as endorser.<sup>1</sup> Unless the corporation is precluded from exercising such a power, the execution, when undertaken, will be presumed to be regular.<sup>2</sup>—When a private corporation has *prima facie* power, either express or implied, to issue negotiable securities, such securities possess the ordinary incidents of negotiable paper; and the holder, acquiring title in good faith before maturity and for value, may recover even though in the particular case the power of the corporation was irregularly exercised.<sup>3</sup> Manufacturing companies in

<sup>1</sup> Railroad Co. v. Howard, 7 Wall. 392; State Bank v. Fox, 3 Blatch. C. C. 431; Came v. Brigham, 39 Me. 35; Patten v. Moses, 49 Me. 255; Farmer's Bk. v. Maxwell, 32 N. Y. 579; Farmer's Bk. v. Watson, 32 N. Y. 583; Mechanic's Ass. v. White Lead Co., 35 N. Y. 505; Strauss v. Ins. Co., 5 Ohio St. 59; Hardy v. Merriweather, 14 Ind. 203; Goodrich v. Reynolds, 31 Ill. 490; Preston v. Mo. Lead Co., 51 Mo. 43; Bacon v. Ins. Co., 31 Miss. 116.

<sup>2</sup> London, etc., R. R. v. Fairclough, 2 Man. & G. 674; Lexington v. Butler, 14 Wall. 282; Great West. Tel. Co. *in re*, 5 Bis. 363; Atlantic Bk. v. Merchant's Bk., 10 Gray, 532; Monumental Bank v. Globe Works, 101 Mass. 57; Clarke v. School Dist., 3 R. I. 199; Brown v. Bank, 3 Barr, 187; Oxford Iron Co. v. Spradley, 46 Ala. 98. Whether a municipal corporation can issue negotiable paper, see Mayor v. Ray, 19 Wall. 468.

<sup>3</sup> Field, Corp. 303; Green's Brice's Ultra Vires, 273-4; Moran v. Miami Co., 2 Black, 722; Lexington v. Butler, 14 Wal. 282; Narragansett Bk. v. Silk Co., 3 Met. Mass. 282; Monument. Nat. Bk. v. Globe Works, 101 Mass. 57; Moss v. Averill, 10 N. Y. 449; Bissell v. Mich. South. R. R., 22 N. Y. 289; McIntire v. Preston, 10 Ill. 48; Smith v.

Flour Mills, 6 Cal. 1; Magee v. Canal Co., 5 Cal. 258.

"Although in such a case," said Dickenson, J., in a case in 1881 in the Supreme Court of Minnesota, "the corporation or its officers exceeded the corporate authority, and its contract would be, hence, in a sense *ultra vires*, yet other legal principles besides those merely relating to the powers of the corporation come in to affect the result. It is true, a corporation is a being created by the law, and has, properly, no authority but such as is conferred upon it, expressly or by implication, by the law of its creation; yet it may become legally bound to observe and perform contracts which it had not authority to enter into. The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading in defence of its assumed obligations that they were *ultra vires*. To apply the principle of estoppel is not to enlarge the powers of the corporation; nor does it give warrant to a corporation to disregard or violate the restrictions which have been expressly imposed upon it, or which exist in the absence of power conferred. Bradley v. Ballard, 55 Ill. 413; R. R. Co. v. McCar-



the United States (though it is otherwise in England) have power to issue negotiable paper;<sup>1</sup> and so have railway companies.<sup>2</sup>

thy, 96 U. S. 258. In this case the defence sought to be made to the note is, that in giving it the article of the defendant's incorporation, limiting the amount of its indebtedness, was violated. The debt was incurred in the ordinary prosecution of the business of the corporation. The defendant received and appropriated the money which was the consideration of the note, and, having authority to issue negotiable paper, it put forth the note in question, negotiable, calculated to circulate as, and perform the office of, commercial paper, and expressing upon its face the obligation and promise of the maker to pay to the bearer, at all events, the sum named. It has come into the hands of a *bona fide* purchaser, and simple justice, as well as plain principles of law, forbid that courts should listen to the plea that in this particular case the corporation had not authority to issue its note. It ought to be, and it is, estopped." *Auerbach v. Mill Co.*, S. C. Minn. 1881, 13 Rep. 51.

<sup>1</sup> *Monument. Bank v. Globe Works*, 101 Mass. 57; *Mott v. Hicks*, 1 Cow. 513; *Banking Ass. v. White Lead Co.*, 35 N. Y. 505; *Oxford Iron Co. v. Spradley*, 46 Ala. 98.

<sup>2</sup> *Railroad Co. v. Howard*, 7 Wall. 412; *Olcott v. R. R.*, 27 N. Y. 546; *Lucas v. Pitney*, 27 N. J. L. 221; *Richmond R. R. v. Sneed*, 19 Grat. 354; and other cases cited *Morawetz on Corp.* § 178.

In *McCalmont v. R. R.*, U. S. Cir. Ct. Phil. 1881, 10 Weekly Notes, 338, it was held that the power in a charter to borrow money does not include the power to issue irredeemable bonds entitling the holder merely to a contin-

gent share in the profits. "In one respect," it was said by McKenna, J., "and in one only, does the plan proposed resemble a loan, and that is in the result to be attained. They are both expedients for raising money, but the method of accomplishing this result is of the essence of the power of the corporation. If its employment has not explicit legal sanction, it cannot be made available. If the defendant were offered a rental for its property amply sufficient to relieve it from the burden of embarrassment with which it is now struggling, unless it could show that its legislative creator had endowed it with a right to make a lease, it could not accept such relief. *Thomas v. West Jersey Railroad Company*, 101 U. S. 82. And, although it has power to acquire real estate for all necessary corporate purposes, no one would maintain that it could lawfully enter into a contract for the purchase of real estate merely to resell and thereby realize large gains. Authority to raise money by borrowing does not imply the use of another and different method of raising it, however well adapted to the end it may be. Even in the prospectus issued by the president of the defendant (Exhibit I) the proposed issue of 'deferred bonds' is not in any aspect treated as a loan, and the system is correctly stated to be new in the United States, and to have been frequently adopted in Great Britain with great benefit to the companies and to subscribers. But we know that in Great Britain this 'system' is expressly authorized by statute, and hence it may be assumed that such legislation was deemed necessary to legalize a resort to it. Is not this suggestive of the

§ 139. The stockholders of a corporation may enjoin it from entering into operations foreign to the object for which it was

inference that, although it has been proved to be of great benefit in Great Britain, it is 'new' in this country because it has been regarded as without necessary legislative authorization?" In *Thomas v. R. R.*, *ut supra*, Miller, J., said: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The question of the validity of the Reading bonds came before the Supreme Court of Pennsylvania, in March, 1882, and by a majority of four to three it was held that the corporation had power to execute the bonds. From the opinion of the majority of the court by Paxson, J., the following passages are extracted:—

"We are in no doubt as to the power of the Philadelphia and Reading Railroad Company to issue the 'deferred income bonds' described in this bill. So far as the mere borrowing of money is concerned, it is not necessary to look into the character of the company for a grant of express powers. It exists by necessary implication. 'As a general proposition, the right of private or trading corporations to issue promissory notes, bonds, or other evidences of indebtedness, unless restrained by their charters or the law of the land, may be conceded.

" 'The reason is plain. Such corporations are organized for the purposes of trade and business, and the borrowing of money and issuing of obligations therefor are not only germane to the objects of their organization, but necessary to carry such objects into effect.'

"There being no objection, therefore, on the ground of want of power, is there anything in the form of the transaction to render it *ultra vires*? We learn from the pleadings that in May, 1880, the company failed and passed into the hands of receivers; that at the time of such failure it had a floating or unfunded debt of upward of \$10,000,000; that a large amount of property, mainly stocks and bonds of great value, had been pledged to secure said debt; and that said stocks and bonds were subject to the risk of being sold at forced sales at a great sacrifice; that the president and managers of the company, in order to pay this floating debt, and thereby regain possession of the collaterals, determined to ask the stockholders to contribute \$10,000,000 for such purpose, for which they proposed to give them \$34,300,000 of deferred income bonds on which interest is to be deferred to a dividend of 6 per cent. on the common stock of the company, and thereafter to take all revenues up to 6 per cent., and then to rank *pari passu* with the common shares for further dividend.

"It will thus be seen that the stockholder who advances \$15 receives a bond for \$50, which is irredeemable, and which is not entitled to interest until after 6 per cent. has been paid upon the common stock.

"The objections that have been made to this scheme are twofold:

chartered;<sup>1</sup> and it is no defence to such an application that none of the parties owning the stock at

Parties interested in corporation

First, that it is usurious; and, second, that the transaction is not a borrowing of money, but the issuing of a deferred stock, which is beyond the power of the company.

"It is sufficient to say in regard to the first objection that as the interest on the 'deferred income bonds' is payable only upon a contingency, the contract is not usurious. Non constat that the company will ever pay anything to this class of bondholders. The contingency which will entitle them to interest may never arise, and is reasonably certain to be postponed for a considerable period. There is, therefore, no contract for the payment of more than legal interest. It is settled law that where the promise to pay a sum above legal interest depends upon a contingency and not upon the happening of a certain event, the loan is not usurious. *Spain v. Hamilton*, 1 Wall. 604; *Lloyd v. Scott*, 4 Peters, 205. This point does not need elaboration.

"The second objection is equally without merit. The bonds in question are not deferred stock either in form or substance. They are certificates of indebtedness under the seal of the company, with a recital that they are irredeemable; that they are entitled to no interest until after the common stock has received 6 per cent., and after that to come in *pari passu* with said common stock. They more nearly resemble a perpetual loan, with the interest indefinitely postponed. The

holders would certainly have no right as stockholders.

"It is urged, however, that this transaction is not a borrowing of money within the implied powers of the company; that the meaning of the word 'borrow' as applied to moneyed transactions involves an obligation to return the sum or thing borrowed. This is a narrow view of the subject. It is true we often use this word in the sense of returning the thing borrowed in specie, as to borrow a horse. But it is not limited to this sense.

"Among the definitions given by Webster are the following: First, 'To take or receive from another on trust, with the intention of returning or giving an equivalent for,' and, second, 'to take from another for one's own use; to adopt from a foreign source; to appropriate; to assume.' We need not give the apt illustrations with which the learned lexicographer adorns his text. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time, it is not always nor necessarily so. The object of loaning money is to obtain a return in the way of interest. The interest is the consideration for the loan, the hire or price which is paid for the use of it. If I agree to pay \$60 for the use of \$1000 for one year, it is a borrowing of money. It is equally so if I contract at the same rate for the use of it for ten years. Is it any the less so when the contract is perpetual and the loan ir-

<sup>1</sup> Lindley on Part. 3d ed. ii. 1059; Field, Corp. §§ 264-271; Salomons v. Laing, 12 Beav. 339; Colman v. R. R., 10 Beav. 1; Beman v. Rufford, 1 Sim. (N. S.) 550; Dodge v. Woolsey, 18 How.

331; Thomas v. R. R., 101 U. S. 71; Colles v. City Directory Co., 18 N. Y. Sup. Ct. 397; Oil Creek Co. v. Trans. Co., 83 Penn. St. 160.

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the time of the act complained of, objected to its consummation.<sup>1</sup> The corporation may not only be compelled to abandon acts which it has no right to do, but it may be compelled to do acts its charter requires.<sup>2</sup> These functions it cannot surrender.<sup>3</sup> When, also, funds are contributed by stockholders to a corporation, they have a right to insist that these funds shall not be diverted to an object utterly distinct. And even the unanimous consent of the shareholders for the time being will not validate, as against subsequent stockholders without notice, transactions utterly foreign to the object for which the company was chartered.<sup>4</sup> But it is not necessary that an authority, to be sustained in execution, should have been expressly given. It is enough if it be implied.<sup>5</sup> And a party applying for aid of this class must show that he has a real interest on behalf of which he claims protection. If the application, though nominally from a stockholder, is really to subserve an adverse interest, it will not be regarded as a ground for interference.<sup>6</sup> It is no bar to

redeemable? The equivalent is paid annually in the shape of interest.

"We do not think trading corporations any more than individuals are restricted in their moneyed transactions to the narrow meaning of the word 'borrow.' In its broader sense it implies a contract for the use of money. The terms of the contract are within the control of the contracting parties so long as they keep within the law. I see no legal objection to a contract for a perpetual loan. Such contract implies the voluntary advance of a sum of money, repayment of which is not to be demanded, presumably for some benefit or advantage to the lender. Such transactions are common in England, and are not unknown in this country. They are referred to in *Union Canal Company v. Antillo*, 4 W. & S. 556, and in the appeal of the *Zoological Society*, 38 *Legal Intelligencer*, 403; and I am informed that the annuity bonds of the *Lehigh Valley*

*Railroad Company* are irredeemable. So long as the company pays the interest the principal is not demandable. If the *Reading Railroad Company* may not accept money from its stockholders as a perpetual loan, I am unable to see how it could accept it as a gift."

That usage may authorize the officers of a corporation to issue notes, without a formal vote, supposing the corporation has power to issue such paper, see *Great West. Tel. Co. in re*, 5 Biss. 313.

<sup>1</sup> *Ashbury R. R. v. Riche*, L. R. 7 H. L. 653.

<sup>2</sup> *Cohen v. Wilkinson*, 12 Beav. 125.

<sup>3</sup> *Thomas v. R. R.*, 101 U. S. 71; *Middlesex, etc. R. R. v. Boston R. R.*, 115 Mass. 347.

<sup>4</sup> *Ashbury R. R. v. Riche*, L. R. 7 H. L. 653; *Colman v. R. R.*, 10 Beav. 1.

<sup>5</sup> *Hart v. R. R.*, 7 Ex. 246, 8 Ex. 116.

<sup>6</sup> *Pollock, ut supra*, 107; *Robson v. Dodds*, L. R. 8 Eq. 301; *Forrest v. R.*

his suit, however, that he may have "collateral motives, or is acting on the suggestions of strangers or enemies to the company, or even has acquired his interest for the purpose of instituting the suit."<sup>1</sup>—A court of equity, therefore, will not only refuse to enforce an executory contract which is *ultra vires*, and as to which no *bona fide* third party is interested,<sup>2</sup> or which conflicts with limitations of the charter;<sup>3</sup> but on application of a stockholder, or any other party interested, such a court will enjoin further proceeding on such a contract.<sup>4</sup>

R., 4 DeG. F. & J. 126; *Kenton v. R. R.*, 54 Penn. St. 401.

<sup>1</sup> Pollock, *ut supra*, citing *Bloxam v. R. R.*, L. R. 3 Ch. 337. In *Pickering v. Stevenson*, L. R. 14 Eq. 322, 340, Wickens, V. C., said: "The special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction, that they are to be exercised in subjection to the special purposes of the original bond of association."

<sup>2</sup> *Thomas v. R. R.*, 101 U. S. 71; *Hitchcock v. Galveston*, 96 U. S. 341; *Kent v. Mining Co.*, 78 N. Y. 159; *Screven Hose Co. v. Philpot*, 53 Ga. 625; *Bank of Michigan v. Niles, Walker*, Mich. 99.

<sup>3</sup> *New York, etc. R. R. v. Schuyler*, 34 N. Y. 34.

<sup>4</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 68; *Arnot v. R. R.*, 67 N. Y. 319; *Bradley v. Ballard*, 55 Ill. 413; *Crutcher v. Bridge Co.*, 8 Humph. 403. In *Hawes v. Water Works Co.*, Sup. Ct. U. S. 1882, we have the following from Miller, J.: "The principle involved in that case (*Dodge v. Woolsey*, 18 How. 331) permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing, and

institute and control a suit in which the rights involved are the rights of the corporation, and the controversy one really between that corporation, entirely capable of asserting its own rights, and the other party, who is equally so. This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation, through its managing agents, in a matter within their authority, cannot be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character, and calling for the extraordinary powers of a court of equity. It is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country. See *Foss v. Harbottle*, 2 Hare Ch. 488; *Mozley v. Alston*, 1 Phillip Ch. 790; *Gray v. Lewis*, L. R. 8 Ch. App. 1035.

"But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the

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§ 140. It has been held in England, as well as in this country, that, when either party to con-

same learned justice in the case of *MacDougall v. Gardiner*, in 1875, L. R. 1 Ch. Div. 21: 'I am of opinion,' he says, 'that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in this court as the rule in *Mozley v. Alston*, *supra*, and *Lord v. Copper Mining Co.*, and *Foss v. Harbottle*, *supra*, should always be adhered to; that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things of which a company may well be entitled to complain, but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company, as a company, which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done.' In this country the cases outside of the federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation

is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust, or are proceeding *ultra vires*. See *March v. Eastern R. R. Co.*, 40 N. H. 548; *Peabody v. Flint*, 6 Allen, 52; *Brewer v. Boston Theatre*, 104 Mass. 378, where the general doctrine and its limitations are very well stated. See, also, *Hersey v. Veazie*, 24 Me. 9; *Samuel v. Holladay*, 1 Wool. 400.

"The case of *Dodge v. Woolsey*, *supra*, is, however, the leading case on the subject in this country. And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration, with a full reference to the decisions then made in the courts of England. . . .

"The examination of the case of *Dodge v. Woolsey*, *supra*, satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of congress referred to, leaves no reason for any expansion of the rule in that case beyond its fair interpretation. We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as a foundation of the suit, some action or threatened action of the managing board of directors or trustees of

tracts of this character enjoys the fruits of the contract, he cannot afterwards, supposing there was no fraud, or notice to the other side, and supposing

party benefiting by it cannot impeach it.

the corporation which is beyond the authority conferred on them by their charter or other source of organization ; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders ; or where the board of directors, or a majority them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders ; or where the majority of shareholders themselves are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

“But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action

on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit. The appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court. He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given—no reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action—no attempt to consult the other shareholders to ascertain their opinions, or obtain their action ; but within five days after his application to the directors this bill is

the case to have been one *prima facie* within the corporate range, set up as a defence that the contract was *ultra vires*. In all cases in which the exercise of a particular power is doubtful, parties desiring to contest it must, before availing themselves of its benefits, attempt by injunction or similar immediate action, to prevent it from being carried into effect.<sup>1</sup> Parties who could thus dispute its exercise cannot, after they have received any substantial benefit it may have worked to them, dispute their liability to pay the consideration.<sup>2</sup> Hence it has been ruled by the Supreme Court of the United States that, "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding instituted for that purpose."<sup>3</sup> And it has been held that a defendant, who, under a contract relating to land made with a corporation claiming to own the land, has received the full benefit of the contract, cannot set up that the contract was *ultra vires*.<sup>4</sup> What has here been declared with regard to executed contracts for the sale of real estate applies to all other executed contracts. When a corporation has received the benefit of an executed contract, it cannot throw up such contract unless it can put the other party *in statu quo*; nor

filed. There is no allegation of fraud or of acts *ultra vires*, nor of destruction of property, or of irremediable injury of any kind. Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done."

<sup>1</sup> Colman v. R. R., 10 Beav. 1.

<sup>2</sup> Fountaine v. R. R., L. R. 5 Eq. 316; Royal Bank v. Turquand, 5 El. & B. 248; 6 El. & B. 327; Taylor v. R. R., L. R. 2 Exch. 356; Ossipee Co. v. Canney, 54 N. H. 295; Bradstreet v. Bk., 42 Vt. 128; Witte v. Fishing Co., 2 Conn. 260; Le Couteux v. Buffalo, 33 N. Y. 333; Whitney Co. v. Barlow, 63 N. Y. 62; reversing S. C. 38 Sup.

Ct. 554; Oil Creek R. R. Co. v. Penns. Trans. Co., 83 Penn. St. 160; Darst v. Gale, 83 Ill. 136; State Board v. Citizen's St. R. R., 47 Ind. 407; Miner's Ditch Co. v. Zellerbach, 37 Cal. 543. See Big. on Est. 3d ed. 284-6; 465-8.

<sup>3</sup> Nat. Bk. v. Matthews, 98 U. S. 621; Gold Min. Co. v. Bank, 96 U. S. 640; Cowell v. Springs Co., 100 U. S. 55; Christian Union v. Yount, 101 U. S. 352; Chester Glass Co. v. Davey, 16 Mass. 94; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Amer. Bible Soc. v. Marshall, 15 Oh. St. 537; Newburg Pet. Co. v. Weare, 27 Oh. St. 343; Notoma Co. v. Clarkin, 14 Cal. 543.

<sup>4</sup> Missouri Valley Land Co. v. Bushnell, 11 Neb. 192.



can it, if there have been any laches on its part, ask for rescission.<sup>1</sup> Hence a railway corporation is liable on its contract to carry passengers on connecting lines, though the contract is technically *ultra vires*.<sup>2</sup> On the one side, when a corporation has performed its part in a contract technically *ultra vires*, the other contracting party will be compelled to perform his part.<sup>3</sup> Thus, in a New York case, a company incorporated for the purpose of manufacturing fire-arms entered into a contract to manufacture railroad locks. As against the party receiving the locks, it was held that the corporation was entitled to recover their price. "The plea of *ultra vires*," said Allen, J., in the court of appeals, "should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."<sup>4</sup> On the other side, a corporation will be estopped from disputing its liability on a contract technically *ultra vires*, when the contract has been performed by the other party.<sup>5</sup>

<sup>1</sup> *Infra*, §§ 285-6; *Zabriskie v. R. R.*, 23 How. 381; *White v. Bank*, 22 Pick. 181; *McClure v. R. R.*, 13 Gray, 124; *Bissell v. R. R.*, 22 N. Y. 258; *Chapman v. R. R.*, 6 Oh. St. 137; *Newburg Co. v. Weare*, 27 Oh. St. 343; *Bradley v. Bullard*, 55 Ill. 413; *Chicago Building Ass. v. Crowell*, 65 Ill. 453; *St. Louis v. Gas-Light Co.*, 70 Mo. 69; *Humphrey v. Patron's Ass.*, 50 Iowa, 607; *Hazlehurst v. R. R.*, 43 Ga. 54; *Argenti v. San Francisco*, 16 Cal. 255.

<sup>2</sup> *Wh. on Neg.* § 579; *Marshall v. R. R.*, 11 C. B. 655; *Martin v. R. R.*, L. R. 3 Ex. 9; *South Wales R. R. v. Redmond*, 10 C. B. N. S. 675; *Wilby v. R. R.*, 2 H. & N. 703; *Bartle v. Wheeler*, 49 N. H. 9; *Burroughs v. R. R.* 100 Mass. 26; *Burtis v. R. R.*, 24 N. Y. 269; *Root v. R. R.*, 55 N. Y. 636; *Buffett v. R. R.*, 40 N. Y. 168.

<sup>3</sup> *Infra*, § 142.

<sup>4</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. See, to same effect, *Railway v. McCarthy*, 96 U. S. 258; *Rutland R. R. v. Proctor*, 29 Vt. 96; *Chester Glass Co. v. Davey*, 16 Mass. 94; *Oil Creek R. R. v. Penn. Trans. Co.*, 83 Penn. St. 160; and other cases cited, *Morawetz on Corp.* § 103, and also *infra*, § 142.

<sup>5</sup> *Field, Corp.* § 273; *Green's Brice's Ultra Vires*, 2d ed. 729; *Jones, Railroad Securities*, § 356; *Hitchcock v. Galveston*, 96 U. S. 341; *Watt's App.*, 78 Penn. St. 370; *Oil Creek Co. v. Penn. Trans. Co.*, 83 Penn. St. 160; *Hays v. Galion Co.*, 29 Oh. St. 330; *Darst v. Gale*, 83 Ill. 136; *Thompson v. Lambert*, 44 Iowa, 239; *Cozart v. R. R.*, 54 Ga. 379. The authorities will be found further noticed in articles, 5 Am. L. Rev. 272; 9 Cent. L. J. 463; and particularly in 12 Cent. L. J. 386.

§ 141. We may, therefore conclude, that the doctrine of estoppel applies to corporations as well as to natural persons. Wherever a natural person would be estopped by his prior action in assuming a particular character, or on permitting his agents to assume such a character, a corporation would under similar circumstances be estopped from asserting a claim of which the other contracting party had no notice.<sup>1</sup> The argument for an estoppel is strengthened in cases in which the corporation has made representations that the proper steps to validate the contested acts have been taken.<sup>2</sup> It would be a gross perversion of franchises granted by the state if a corporation, created as an engine of business accommodation, after enjoying the proceeds of a contract, should be permitted, when called upon to pay the consideration for what it has enjoyed, to set up a technical bar of *ultra vires*.<sup>3</sup> And although a contract may not be executed in the way the charter prescribes, yet, so far as concerns third parties without notice, it may bind the corporation.<sup>4</sup> When, it is true, the charter is a public statute, of which all parties are required to take notice, and when the deviation is as to a matter of substance, and not as to a matter of form, then parties making contracts with the corporation do so at their own risk.<sup>5</sup> But when the deviation

Corporation may be estopped as to *bona fide* third parties.

<sup>1</sup> *Infra*, § 796; Wh. on Ev. § 1151; Big. on Est. 3d ed. 467; Pollock, 3d ed. 142; Webb v. Herne Bay, 1 L. R. 5 Q. B. 642; Barwick v. Eng. Joint St. Co., L. R. 2 Exch. 259; Crook v. Seaford, L. R. 6 Ch. 551; Bank U. S. v. Dandridge, 12 Wheat. 64; Pendleton v. Army, 13 Wall. 297; Episcopal Charitable Soc. v. Episcopal Church, 1 Pick. 372; Bird v. Daggott, 97 Mass. 494; Monument. Bk. v. Globe Works, 101 Mass. 57; Stoddard v. Foundry Co., 34 Conn. 542; Bissell v. R. R., 22 N. Y. 258; Grape Sugar Co. v. Small, 40 Md. 395; Schaeffer v. Bonham, 95 Ill. 368; Home Ins. Co. v. Sherwood, 72 Mo. 461.

<sup>2</sup> Hackett v. Ottawa, 99 U. S. 86;

Block v. Commis., 99 U.S. 686; Monasha v. Hazard, 102 U. S. 81; Tipton v. Locomotive Works, 103 U. S. 523; Jasper v. Ballou, 103 U. S. 745, see Big. on Est. 3d ed. 467; *infra*, § 796.

<sup>3</sup> See *supra*, § 140, and see *infra*, § 796.

<sup>4</sup> Merchant Bank v. State Bank, 10 Wall. 604; Badger v. Bank, 26 Me. 428; Witte v. Fishing Co., 2 Conn. 260; Reynolds v. Kenyon, 43 Barb. 585; Bank of Kentucky v. Schuykill Bk., 1 Pars. Sel. Cas. 180; Aurora Co. v. Paddock, 80 Ill. 263; Northern Bank v. Johnson, 5 Coldw. 88.

<sup>5</sup> Davis v. R. R. and other cases cited *supra*, § 137.

is not as to matter in respect to which third parties are bound to take notice, or when it involves a mistaken subsumption of facts under law,<sup>1</sup> then the corporation is bound notwithstanding such deviations.<sup>2</sup>—But this is not to be so extended as to make a corporation liable for functions which it is expressly prohibited by its charter from exercising, and which are plainly out of the range of its powers, or of the powers of the officer undertaking them.<sup>3</sup> It is otherwise, however, as to transactions within the ordinary range of corporate action of institutions of the same class, though forbidden by the particular charter.<sup>4</sup>—So far as concerns the formal proceedings of corporations, such proceedings will be presumed to be regular until the contrary be shown. The burden is on the party seeking to prove irregularity.<sup>5</sup> When, however, a statute prescribes certain material conditions as the prerequisites of corporate action, it must appear from the face of the proceedings that these conditions are satisfied.<sup>6</sup>

§ 142. A distinction, also, is to be observed between suits against and suits by a corporation. When a corporation is sued on an executory contract which is *ultra vires*, the attempt is to drag it into a sphere in which it cannot legally exist. When a corporation seeks to enforce a contract on which it has already performed its part, it may go out of its sphere, but this is

Distinction between suits against and suits by a corporation.

<sup>1</sup> *Infra*, § 199.

<sup>2</sup> Merchants' Bk. *v.* State Bk., 10 Wall. 604; Stoney *v.* Ins. Co., 11 Paige, 635; Genesee Bk. *v.* Patchin Bk., 3 Kern. 309; Farmers' Bk. *v.* Butchers' Bk., 16 N. Y. 125; Bradley *v.* Ballard, 55 Ill. 413; Thompson *v.* Lambert, 44 Iowa, 239.

<sup>3</sup> Pollock, *ut supra*; Foster *v.* Essex Bank, 17 Mass. 479; Austin *v.* Daniels, 4 Denio, 299; First Nat. Bk. *v.* Ocean Nat. Bk., 60 N. Y. 278; Ogdensburg R. R. *v.* Vt. R. R., 6 Thomp. & C. 488; 4 Hun, 268; see Brown *v.* Donnell, 49 Me. 421; Hood *v.* R. R., 22 Conn. 502.

<sup>4</sup> Badger *v.* Bank, 26 Me. 428; Bank

of Ky. *v.* Schuylkill Bk., 1 Parsons Sel. Cas. 180; Hagerstown Bk. *v.* London Soc., 3 Grant (Penn.) 135.

<sup>5</sup> Wh. on Ev. § 1310; Grady's case, 1 DeG. J. & S. 488; Express Co. *v.* R. R., 99 U. S. 199; Muzzey *v.* White, 3 Greene, 290; Copp *v.* Lamb, 12 Me. 312; Hathaway *v.* Addison, 48 Me. 440; Cobleigh *v.* Young, 15 N. H. 493; Bassett *v.* Porter, 10 Cush. 418; McFarlan *v.* Ins. Co., 4 Denio, 392; Yates *v.* Van De Bogert, 56 N. Y. 526; Endres *v.* Lloyd, 56 Ga. 547; Dana *v.* Bank, 4 Minn. 385; see Morris R. R. *v.* Sussex R. R., 20 N. J. Eq. 542.

<sup>6</sup> Clark *v.* Wardwell, 55 Me. 61.

for the purpose of turning into that sphere the fruits of its own action. Hence, there are many cases in which contracts sued on by corporations have been sustained on the ground that the profits go to the lawful uses of the corporation, when, were the purpose to apply the funds of the corporation to a purely extraneous object, the action of the corporation would be held *ultra vires*.<sup>1</sup> The plea of *ultra vires*, for instance,

<sup>1</sup> National Bank *v.* Matthews, 98 U. S. 621; Old Colony R. R. *v.* Evans, 6 Gray, 25; National Bank *v.* Porter, 125 Mass. 333. The cases on this point are thus examined by Gray, C. J., in Davis *v.* R. R., *ut supra*. "In Chester Glass Co. *v.* Dewey, 16 Mass. 94, the plaintiff, a corporation established for the purpose of manufacturing glass, kept a shop near its factory, for the accommodation of its workmen, containing a general assortment of such goods as are usually kept in country stores; and the defendant was a carpenter, living near, who made boxes and did other carpenter's work for the corporation. In an action for the price of goods sold and delivered to him from the shop, the defendant objected that the plaintiff was not authorized by law to keep such a shop and to sell goods in this manner; and it was held that this objection could not avail him. The leading reason assigned was, 'The legislature did not intend to prohibit the supply of goods to those employed in the manufactory;' in other words, the contract sued on was not *ultra vires*. This reason being decisive of the case, the further suggestion in the opinion, 'Besides, the defendant cannot refuse payment on this ground; but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused,' was, as has been since observed by the court, wholly *obiter dictum*. Whittenton Mills *v.* Upton, 10 Gray, 599.

"In Old Colony Railroad *v.* Evans, 6 Gray, 25, the defendant, being under contract to haul a large quantity of gravel on to lands belonging to the city of Boston, made an agreement in writing with the plaintiff corporation, by which it agreed to purchase a tract of land in Quincy, and he agreed to take gravel therefrom, and to carry it in his own cars over the plaintiff's road to Boston, paying a specified toll; the defendant afterwards further agreed in writing, that if the plaintiff would purchase another tract for the same purpose, he would pay the cost of the first tract; and both tracts were purchased by the plaintiff. The objection that the corporation had no right to trade in gravel or land was raised by the defendant by way of defence to a bill in equity by the corporation for specific performance of his second agreement, by accepting a deed of and paying for the first tract. There can be no doubt of the correctness of the decision overruling the objection. The corporation, by its purchase, had acquired a title to the land, which was good against all the world, except, possibly, the commonwealth; and the defendant, having knowledge of all the facts, did not and could not object that the title might be defeasible by the commonwealth. Banks *v.* Poitiaux, 3 Rand. 136; Leazure *v.* Hillegas, 7 S. & R. 313; Goundie *v.* Northampton Water Co., 7 Penn. St. 233; Silver Lake Bank *v.* North, 4 Johns. Ch. 370, 383; Smith *v.* Sheeley, 12 Wall. 358; Common-

cannot be properly interposed when a corporation lends money and seeks to recover the loan,<sup>1</sup> or when it sells goods and seeks

wealth *v. Wilder*, 127 Mass. 1, 6. Although it was said in the opinion, that the purchase of the land seemed to have been made as a mode of promoting the purposes of the plaintiff's incorporation, the increasing of its business in transportation upon its railroad, and not as an object of trade or speculation in lands, the point adjudged was that the want of corporate capacity to purchase and sell lands was not a legal objection to the maintenance of the bill. The only authority referred to by the court was the treatise of Angell & Ames on Corporations, secs. 10, 11, 151, 153, of which the section most directly applicable is section 153, in which it is clearly laid down that a court of equity will enforce against a natural person his agreement to purchase of a corporation lands which it holds in violation of its charter, but will not enforce against a corporation its agreement to purchase lands for a purpose not authorized by its charter. The distinction is obvious. In the latter case, to enforce the agreement against the corporation is to compel the application of its funds to a purpose not authorized by law. In the former case, to compel the individual to take and pay for the property according to his agreement is the surest and most effectual means of replacing in the treasury of the corporation, for its lawful uses and the benefit of its stockholders, the funds which it had misapplied. *Rutland, etc. R. Co. v. Proctor*, 29 Vt. 93, 97.

"In *National Pemberton Bank v. Porter*, the point decided was, that the objection that a national bank had exceeded its powers by purchasing a promissory note from an indorsee thereon did not prevent it from maintaining an action upon the note against the maker; for the reasons, that the action was not brought upon the contract of purchase, or against any party to that contract, and that it was not necessary in this commonwealth that the plaintiff in an action on the promissory note should have any title or interest in it. See also *Attleborough National Bank v. Rogers*, 125 Mass. 339.

"In *National Bank v. Matthews*, 98 U. S. 621, the act of congress providing that a national bank might purchase and hold real estate for certain enumerated purposes only, of which to secure money lent at the time of taking a mortgage, was not one, was held by a majority of the court, in accordance with the opinion of Chancellor Kent, in *Silver Lake Bank v. North*, above cited, not to make void a mortgage given to secure the payment of a promissory note for money so lent, nor to prevent the bank from enforcing such a mortgage. A like decision was made in *National Bank v. Whitney*, 103 U. S. 99.

"A corporation may, indeed, be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to main-

<sup>1</sup> *Steam Nav. Co. v. Wead*, 17 Barb. 378; see *Hays v. Galion Co.*, 29 Oh. St. 330; *Darst v. Gale*, 83 Ill. 141; though see *contra*, *Grand Lodge v. Waddill*, 36

Ala. 313. That this is the case with usurious contracts, see *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Perkins v. Watkyns*, 58 Tenn. 173.

to recover the price.<sup>1</sup> On the other hand, when it is sued on a purely executory contract, in which no *bona fide* third party intervenes, and on which there is no estoppel, it is free to show that the contract was *ultra vires*.

§ 143. Municipal corporations occupy, so far as concerns the questions now before us, a distinctive position. They are not chartered to do business in the sense that a bank or a railroad is chartered to do business. Their object is municipal government, and what this means is to be learned, not from business usage, but from the legislation of the state. Hence there is a tendency to limit the contracts of municipal corporations much more strictly than the contracts of banks, and of railroad and insurance corporations.<sup>2</sup> But when a municipal corporation is authorized to perform certain business duties—*e. g.*, to issue bonds—it will be bound, as against *bona fide* purchasers, by the recitals of its officers in such bonds to the effect that the conditions of the enabling statute were complied with,<sup>3</sup> though it is otherwise when the bond refers to a statute which is misrecited.<sup>4</sup> And the agents of a municipal corporation cannot bind it to objects foreign to the object of its existence.<sup>5</sup> It is otherwise, however, as to matters apparently within its range, as to which it cannot refuse, when it has received the benefits of the contract, to perform its part on the ground that the

tain the action against the corporation is not to affirm, but to disaffirm the illegal contract. *White v. Franklin Bank*, 22 Pick. 181; *Morville v. American Tract Society*, 123 Mass. 129, 137; *Cork, etc. Railway in re*, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guaranty the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers as likely to result from the making of the agreement, and that the other party has incurred expenses on the faith of

it.” See, also, *Franklin Co. v. Lewiston*, 68 Me. 43; *Downing v. R. R.*, 40 N. H. 230. See to same effect *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

<sup>1</sup> *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

<sup>2</sup> *Thomas v. Richmond*, 12 Wall. 349; *Mayer v. Ray*, 19 Wall. 468; and see cases cited, *supra*, §§ 140–1.

<sup>3</sup> *Gelpcke v. Dubuque*, 1 Wall. 175; *Supervisors v. Schenck*, 5 Wall. 784; *Lexington v. Butler*, 14 Wall. 296; *Coloma v. Eaves*, 92 U. S. 484; *Natchez v. Mellery*, 54 Miss. 499; and cases cited, *supra*, §§ 138–140.

<sup>4</sup> *McClure v. Oxford*, 94 U. S. 429.

<sup>5</sup> *Dillon, Munic. Corp.* § 381.

contract is technically *ultra vires*.<sup>1</sup>—So far as concerns the question of the due execution of a power, the rule is thus authoritatively stated: “Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal.”<sup>2</sup> And, as we have seen,<sup>3</sup> a corporation will be estopped by its recitals of due execution.<sup>4</sup>

<sup>1</sup> *Ibid.*; *supra*, § 141; *Hitchcock v. Galveston*, 96 U. S. 341; *East St. Louis v. Gas Co.*, 98 Ill. 415; and other cases cited, *Big. on Est.* 3d ed. 467; 12 Cent. L. J. 390.

<sup>2</sup> *Strong, J., Coloma v. Eaves*, 92 U. S. 484; and see *Commissioners v. Bolles*, 94 U. S. 104; *Rock Creek v. Strong*, 96 U. S. 271; *Davies v. Huidekoper*, 98 U. S. 98; *Hackett v. Ottawa*, 99 U. S. 86.

<sup>3</sup> *Supra*, § 141.

<sup>4</sup> In *Eufaula v. McNab*, Sup. Ct. of Ala. 1881 (12 Rep. 484), the question arose under the following section of the act of the legislature chartering the city of Eufaula: “Sec. 24. Be it further enacted, that the council shall have full power and authority to purchase, and provide for the payment of the same, all such real estate and personal property as may be required for the use, convenience, and improvement of the city,” etc. The council of Eufaula, in 1872, purchased from the appellee, McNab, thirty-four acres of land located within the corporate limits of the city, and a warranty deed was executed by McNab, conveying

the same in fee simple to the city. The consideration paid was \$10,000 of the bonds of the city. A bill was filed to enforce the vendor’s lien on the land for the accumulated interest, which amounted to about \$5000, and also to fix the liability of the city of Eufaula for principal and interest of the bonds. The chancellor made the decree prayed for, and ordered the sale of the lands for its payment, and the city appealed from this decree.

It was held by the Supreme Court, that, as the land in question was not purchased for an exclusively public use, the purchase was *ultra vires*. “It may be conceded,” said Somerville, J., “if the land in question had been purchased for an exclusively public use, as being designed for dedication to a purpose within the usual scope of municipal governments, it might be a proper exercise of corporate power under the above section, and the validity of the contract of purchase would not be affected or rendered invalid by any subsequent perversion of the land to unauthorized uses not shown satisfactorily to have been

mutually intended at the time of the purchase. 2 Dillon on Mun. Corp. § 444; *Weismer v. Douglass*, 64 N. Y. 91. But the terms of the charter are imperative that such property must be 'required for the use, convenience, and improvement of the city.' Collateral advantages incidentally resulting in the promotion of the city's commercial or business prosperity will not be sufficient. It is not contemplated or permitted that such property shall be acquired in aid of any private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. As said by Mr. Justice Miller, in *Loan Association v. Topeka*, 20 Wall. 655, 660: 'It follows that in this class of cases the right to control must be limited by the right to tax, and if in the given case no tax lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.'

"The doctrine," so it is argued, "grows out of the nature of such institutions, and rests upon solid and reasonable grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons may not only know, but be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it alone can act if it acts at all, keep within the limits of the chartered authority of the corporation. 1 Dillon on Mun. Corp. (2d ed.) § 381. Municipal corporations, it is obvious, can

exercise only such powers as are expressly granted in their charters, and such as may be necessary and proper in order to carry such express or direct powers into effect; but these powers include those which are indispensably necessary to the declared objects and germane to the governmental purpose for which such corporations may be organized. *City Council v. Road Co.*, 31 Ala. 76; *Mayor v. Yuille*, 3 Ib. 137; 1 Dillon on Mun. Corp. § 55; *Ins. Co. v. Ely*, 5 Conn. 560. All contracts, therefore, which are unauthorized by these principles are *ultra vires*, and impose no legal liability upon the corporations which purport to be bound by them. This is conceded to be a most salutary principle, and one of transcendent importance to the protection of the citizen against exorbitant and unauthorized taxation, imposed for ends entirely foreign to legitimate governmental purposes. 1 Dillon on Mun. Corp. § 55; § 381, note 2. To such an extent is this true, that the law rather favors the application of the doctrine of *ultra vires* to municipalities and counties which are invested with civil, police, and political functions; and in case of any ambiguity or doubt arising out of terms used in the charter, they are strictly instructed against the existence of such doubtful powers, and are resolved by construction in favor of the public. *Green's Bryce's Ultra Vires*, 42, note; *Mayor v. Ray*, 19 Wall. 468; *Minturn v. Larue*, 23 How. 435; 1 Dillon on Mun. Corp. § 55, note 1; 2 Kent Com. §§ 51, 292; *Stetson v. Kempton*, 13 Mass. 272.'

In *Buffalo R. R. v. Falconer*, 103 U. S. 821, the evidence was that the town of Ellicott, being authorized by statute to subscribe to the stock of a railroad company, upon petition of the taxpayers, either absolutely or condition-



ally, the taxpayers petitioned that such subscription should be made, conditionally, upon the railroad being constructed through a certain village. A contract was then made by the town commissioners with the railroad company, before the railroad was so constructed, that they would make the subscription when the condition was complied with. This contract was held to be *ultra vires*, and without force and effect as against the township.

"We are clearly of opinion," said Bradley, J., "that the agreement made by the commissioners with the railroad company in June, 1872, was *ultra vires*. Their powers were confined to subscribing for the stock and making and issuing the bonds in payment thereof, when and as the petition of the taxpayers directed—that is, after the road was completed through Jamestown. By the act of 1870 they might also stipulate as to the instalments in which the bonds should be delivered,

and the purposes for which they might be applied. But the power to do this being but an incident of the principal power to make and issue the bonds, and being only intended to enable the commissioners to prescribe the time and manner of their issue and the uses to which they should be applied, would not properly arise, and could not be effectively exercised, until the principal power itself arose and became exercisable. Whilst, however, the commissioners had the power, or, rather, would have the power, at the prescribed time, to subscribe for the stock and to execute and issue the bonds, neither the statutes, nor the taxpayers' petition, gave them any power to make a contract to subscribe for stock, nor a contract to deliver bonds to the railroad company. They were not charged with any such duty; they were not invested with any such power."

## CHAPTER VIII.

## DURESS.

Consent obtained by duress is inoperative, § 144.	Nor fear of legal procedure, § 150.
Distinction between "void" and "voidable," 145.	Threat of criminal prosecutions avoids, § 151.
Party or privies may defend on this ground, <i>bona fide</i> endorsees, § 146.	And so of criminal prosecutions of near relations, § 151 <i>a</i> .
The danger must be real from standpoint of party threatened, § 147.	Must be causal relation between the duress and the consent, § 152.
There must be violence threatened, § 148.	Person from whom the duress proceeds immaterial, § 153.
Duress of goods does not invalidate promise, § 149.	Such contracts may be ratified, § 154.

§ 144. THE earlier scholastic jurists speak of duress as either absolute or compulsive. Absolute is where the person forced is purely passive, his will in no sense coöperating. A contract apparently accepted in such cases is null and void.<sup>1</sup> Compulsive duress (kompulsive Gewalt) is where the will of the person coerced is made to yield to the coercion, in which case the obligation is in strict law valid, though open to be impeached *ope exceptionis*. A contract thus induced is *ipso jure* valid; but there arises a counter obligation *ex aequitate*, by which the contract may be assailed (1) by the *actio quod metus causa*, (2) by the *exceptio doli*, (3) by the *restitutio in integrum*.—But this distinction is stoutly contested by Grotius,<sup>2</sup> and by other jurists of the naturalistic school, it being argued by them that what is willed under compulsion is not to be regarded as willed.<sup>3</sup>

<sup>1</sup> See Savigny, Röm. Rech. III. 109.

<sup>2</sup> De jure belli ac pacis, II. cap. XII. § 7; though see Pufendorf, de jure nat. et gent. lib. III. cap. 6, § 10.

<sup>3</sup> Thus Boehmer, L. c. cap. 1, § 13, p. 779, writes: "Quid enim opus his

ambagibus; si mes arbitrio liberari possum, et obligationem nullem in me deprehendo, imprimis cum promissor, si promissarius nolit, liberationem sibi ipsi praestare possit."

The German code, following authorities to be hereafter more fully noticed, rejects this distinction, prescribing that expressions of the will to which a party is forced by physical power, have no binding effect, whether the consent be given or not. As illustrations of such physical power are enumerated the withdrawal of food, the application of torture, and such threats of bodily violence as are likely to overcome in the particular case a resisting will.<sup>1</sup> In our own law the same position has been recognized, and it has been frequently ruled that consent obtained by duress is inoperative. Striking illustrations of this are to be found in prosecutions for robbery and rape, in which it is not necessary to prove that the party injured resisted to the extreme end, but in which it is enough if the prosecution shows that submission was coerced by threats of life.<sup>2</sup> In suits on contracts the same rule prevails. A party can set up as a valid defence to a suit on a contract, that it was agreed to by him under threats of great violence.<sup>3</sup>

<sup>1</sup> A. L. R. L. 4, § 32, see L. 3, § 1, D. quod metus causa, and other citations given by Koch, § 75.

<sup>2</sup> Wh. Cr. L. 8th ed. §§ 146, 577, 850.

<sup>3</sup> 1 Roll. Abr. 688; 1 Bl. Com. 131; Paxton v. Popham, 9 East, 421; Williams v. Bayley, L. R. 1 H. L. 218; Baker v. Morton, 12 Wal. 150; French v. Shoemaker, 14 Wal. 314; Whitefield v. Longfellow, 13 Me. 146; Watkins v. Baird, 6 Mass. 511; Lewis v. Bannister, 16 Gray, 500; McMahon v. Smith, 47 Conn. 221; Neilson v. McDonald, 6 Johns. Ch. 210; Stouffer v. Latshaw, 1 Watts, 167; Miller v. Miller, 68 Penn. St. 486; Reynolds v. Copeland, 71 Ind. 422; Seiber v. Price, 26 Mich. 518; Gist v. Frazier, 2 Litt. 118. Money, also, paid under duress may be recovered back. *Infra*, § 730 *et seq.*; Oates v. Hudson, 6 Exch. 340; Motz v. Mitchell, 91 Penn. St. 114; Schulz v. Culbertson, 49 Wis. 122. On the subject of duress the Roman literature is very full. See Koch, op.

cit. § 75; Savigny, Rom. Rechts, II. § 114; Gundling, de efficientia metus tum in promissionibus liberarum gentium, tum etiam hominum privatorum, auxiliis contra metum; Boehmer, de exceptione metus injusti; Rudolph, de effectu metus in pactis et contractibus; Lennep, de eo quod metus causa gestum; Tiennes, de eo quod metus causa gestum erit jure Romano. That a money consideration does not by itself cure a sale by duress, see Foshay v. Ferguson, 5 Hill, 154; Belote v. Henderson, 5 Cold. 471. That duress must be specially pleaded, see Bac. Abr. Duress, C. That proof of duress is admissible to impeach execution of document, see Davis v. Fox, 59 Mo. 125; Davis v. Luster, 64 Mo. 43; Moore v. Rush, 30 La. Ann. 1157; Bane v. Detrick, 52 Ill. 19; Thurman v. Burt, 53 Ill. 129; Bosley v. Shenner, 26 Ark. 280; Diller v. Johnson, 37 Tex. 47; Olivari v. Menger, 39 Tex. 76. That the doctrines of equity and of law are in this respect the same, see Story, Eq. Jur.

And courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and, if there is any good ground to suspect oppression or imposition in such cases, they will set the contract aside.<sup>1</sup> Circumstances, also, of extreme necessity and distress, though not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome free agency as to justify the court in setting aside a contract made by a party, "on account of some oppression, or fraudulent advantage, or imposition, attendant upon it."<sup>2</sup>

§ 145. Duress, therefore, does not presuppose that the person acted on becomes a mere automaton. It is true that there may be, as has been just said, absolute duress. One man's hand may be used by another to pull a trigger, or by another he may be held back from doing something he is about to do. Action thus forced is without legal effect; a contract thus compelled is void. The great majority of the cases of duress, however, are those in which one man's will is influenced by fear to execute another man's purpose. Mere fear, it is true, will not have this effect. Multitudinous contracts, induced by fear, have been held valid; it is only when the fear is brought about by the threats of the party benefiting by the contract that invalidity may result.<sup>3</sup> Duress and freedom, as is justly remarked by Savigny,<sup>4</sup> are not incompatible. The speculative questions

12th ed. § 239; *Miller v. Miller*, 62 Penn. St. 486; *Harshaw v. Dobson*, 64 N. C. 384; *Thurman v. Burt*, 53 Ill. 129.

<sup>1</sup> Story, Eq. Jur. 12th ed. § 239, citing *Roy v. Beaufort*, 2 Atk. 190; *Nicholls v. Nicholls*, 1 Atk. 409; *Hinton v. Hinton*, 2 Ves. 634; *Falkner v. O'Brien*, 2 B. & B. 214; *Griffith v. Spratley*, 1 Cox, 383; *Underhill v. Horwood*, 10 Ves. 219; *Attorney Gen. v. Gothon*, 2 Vern. 497. To same effect, see *Smith v. Monteith*, 13 M. & W. 427; *Soule v. Bonney*, 37 Me. 128; *Tilley v. Damon*, 11 Cush. 247.

<sup>2</sup> See *infra*, § 169.

<sup>3</sup> Windscheit, Pandekt. § 80.

<sup>4</sup> Röm. Recht, iii. § 114. Savigny's doctrine, that contracts made under coercion are to be regarded as "willed," and are, therefore, voidable and not void, has been criticised with much acuteness by subsequent German critics.—See Schliemann, *Lehre von Zwange*, 1861; Czylark in *Ihering's Jahr. XIII.* 1. Brinz (Pandkt. § 320), while acquiescing in Savigny's position in respect to obligations that are purely voluntary, such as stipulations, holds that it does not apply in cases where a material *causa justa* is essential to the validity of a transaction. If in such

involved do not touch practical jurisprudence any more than they touch practical life; in jurisprudence, in such cases, to follow Savigny's exposition, we have to deal with freedom only so far as it involves the capacity to choose between three possible conclusions: to do the thing which the threatening party requires, to repel the violence threatened, or to submit to this violence. If the party assailed chooses the first of these alternatives he chooses it as much as if he chose one of the others, and there is a voluntary acceptance of the act on his part sufficient at least to make a *prima facie* contract. This view is accepted by the Roman standards: "*Tamen coactus volui*," is the term applied in one striking passage; and in another<sup>1</sup> we are told, "*Si patre cogente ducit uxorem, quam non duceret, si sui arbitrii esset . . . maluisse hoc videtur*." Contracts thus influenced are not, therefore, nullities of themselves. They are valid on their face; but at the same time they are assailable on grounds of public policy. For one man by coercion to wring a bargain from another is a wrong for which the law gives redress. The party injured is entitled either to defend on this ground a suit brought on the contract thus extorted, or to recover back the thing extorted from him in a distinct suit.—In our own law the same distinction is maintained. Physical compulsion precludes assent. A man whose hand is taken by another and placed by force on a paper no more assents to what the paper contains, than an idiot assents to a paper to which he attaches his mark. There can be no ratification because there is nothing to ratify. On the other hand, an assent not under physical, but under moral compulsion, constitutes a contract *prima facie* valid. The contract, it is true, may be repudiated by showing duress.<sup>2</sup> But until repudiated and annulled by the proper court, it

case *metus* comes in to prevent the weighing of *causa*, the transaction remains invalid. But it cannot be claimed that in the determination of *causa* the will does not act. If it does act, no matter under what compulsion, then the thing done is willed. It is

open to be set aside for undue influence or coercion. In either case, however, it was *consent* that was unduly influenced or coerced.

<sup>1</sup> L. 21, 22, de vitu nupt. xxiii. 2.

<sup>2</sup> See authorities at end of last section.

binds; and repudiation is precluded by ratification at a time when the duress was removed.<sup>1</sup>

§ 146. Not only the party himself, but privies, may contest a promise on the ground of duress, so that all parties taking with notice are infected with the same disability.<sup>2</sup>—An indorser, who has indorsed a note in good faith, without knowledge that it was obtained by duress, may set up the duress of the maker to a defence against the holder, who was participant in the duress.<sup>3</sup> As a general rule, however, the defence is to be restricted to the party on whom the duress has been exercised, and to those claiming under him.<sup>4</sup> Hence the duress of the maker is no defence to a *bona fide* indorsee for value without notice.<sup>5</sup>

§ 147. Fear, to be a defence, must be real and sincere: it must be *metus non vanus sed justus*.<sup>6</sup> This is the case, so the Roman jurists declare, when danger to life, health, liberty, or honor is threatened.<sup>7</sup> Hence the maxim: *Excusat carcer, status, mors, verbera, stuprum*.<sup>8</sup> But it is not necessary that the danger should be real. It is enough if it honestly exist in the estimation of the party yielding to the threat.<sup>9</sup> We must put ourselves in his place in order to determine whether the threat was likely to have been operative; and for this purpose it is admissible to show that he was at the time of the transaction peculiarly sensitive to influences of this kind, and that this was known to the party attempting to apply the influ-

<sup>1</sup> *Infra*, § 154.

<sup>5</sup> *Bowman v. Hiller*, 130 Mass. 153;

<sup>2</sup> *Huscombe v. Standing*, Cro. Jac. 189; *McClintock v. Cummins*, 3 McL. 158; *Fisher v. Shattuck*, 17 Pick. 252; *Spaulding v. Crawford*, 27 Tex. 155.

see *infra*, § 347.

<sup>6</sup> L. 6, D. iv. 2.

<sup>7</sup> L. 5, D. eod. L. 3, § 1, in f.; L. 4, § 8, eod. L. 4, and 7 C. eod.

<sup>3</sup> *Griffith v. Sitgreaves*, 90 Penn. St. 161.

<sup>8</sup> To same effect see *Baker v. Morton*, 12 Wal. 150; *Bowker v. Lowell*, 49 Me. 429; *Miller v. Miller*, 68 Penn. St. 486.

<sup>4</sup> *Huscombe v. Standing*, Cro. Jac. 187; *Manlett v. Gibbs*, 1 Brownl. 64; *McClintock v. Cummins*, 3 McL. 158; *Robinson v. Gould*, 11 Cush. 55; *Thompson v. Lockwood*, 15 John. 256; *Steuben Bk. Co. v. Matthewson*, 5 Hill, 249; Bac. Ab. tit. Duress, A.

<sup>9</sup> That this is the case when fear of violence is set up as a defence to a prosecution for homicide, see Wh. Cr. L. 8th ed. § 488.

ence. The condition of the mind of the party yielding to such influence is to be determined from that of his own standpoint, and not from that of an ideal average.<sup>1</sup> In the Roman law we have several rulings to the effect that in determining whether consent was extorted by fear, we are to take into consideration the physical condition, the sex, the mental and nervous condition, the education, and the peculiar social and domestic relations of the party threatened.<sup>2</sup> "*Metus autem causa abesse videtur, qui justo timore mortis, vel cruciatus corporis conterritus abest; et hoc ex affectu ejus intelligitur. Sed non sufficit quolibet terrore abductum timuisse, set hujus rei disquisitio judicis est.*"<sup>3</sup> In our own law the same distinction is maintained.<sup>4</sup>

§ 148. But there must be actual physical violence threatened. A deed, for instance, which is executed in dread of purely imaginary dangers may be con-  
Must be  
violence  
threatened.  
 tested on the ground of insanity, but not on the ground of duress.<sup>5</sup> It must be "*Metus non illatus, quem nullae minae praecessirint.*"<sup>6</sup> In the Roman standards this view is repeatedly affirmed. Thus it has been held no ground to invalidate a contract that it was induced by a desire to propitiate a party to whom a wrong had been done;<sup>7</sup> nor by a desire to evade a prosecution for crime, the contract being fair, and there being no knowledge on the other side that this was the motive, and no attempt at extortion;<sup>8</sup> nor, if there be no unfair influence exerted to extort an unjust bargain, will a contract be held invalid because the party subsequently assailing it was influenced by peculiar reverence (*metus reverentialis*) for the other contracting party.<sup>9</sup> In the

<sup>1</sup> Wh. Cr. L. 8th ed. § 489.

<sup>5</sup> L. 14, § 3; L. 9, § 1, D. eod.

<sup>2</sup> L. § 3, D. ex quibus causis majores (iv. 6).

<sup>6</sup> Koch, ii. 107. See Seymour v. Prescott, 69 Me. 376; Tapley v. Tapley, 10 Minn. 448.

<sup>3</sup> Gail, obs. Lib. ii. obs. 93; Bruneman, ad L. 6, C. h. t. Leyser, spec. 58, m. 3, L. 8 D. h. t.

<sup>7</sup> L. 21, pr. D. eod. Donellus, L. xv. cap. 39; No. 60.

<sup>4</sup> Bispham's Eq. § 230; Williams v. Bayley, L. R. 1 H. L. 218; Neilson v. McDonald, 6 Johns. Cas. 210; McCandless v. Engle, 51 Penn. St. 309; Loudon v. Blythe, 16 Penn. St. 532.

<sup>8</sup> L. 10, C. h. t. Donellus, *ut supra*.

<sup>9</sup> See L. 7, pr. D. quod metus causa. Leyser, L. c. m. 2; Boehmer, L. C. cap. ii. § 8, p. 788.

same line may be cited numerous cases in our own courts in which it has been held that the mere fact that a promisee has obtained an ascendancy over the promisor is in itself no ground for setting aside a promise.<sup>1</sup> Nor do specific forebodings of disaster, not otherwise to be averted, have their effect, when such influence does not emanate from the promisee. Thus it has been held in New Jersey to be no defence at common law to an action against a married woman on a note signed by her that she was led to sign it by her husband's saying that if she did not sign, he would commit suicide.<sup>2</sup> Nor do threats of disaster even by the promisee necessarily avoid. Thus the fact that a sheriff was induced to give a special bond, not legally obligatory on him, by threats of the board of supervisors, that, unless he did, his office would be declared vacant, does not by itself avoid the bond.<sup>3</sup> In an

<sup>1</sup> *Infra*, § 158.

<sup>2</sup> *Wright v. Remington*, 41 N. J. L. 48.

<sup>3</sup> *State v. Harney*, 57 Miss. 863.

In *Wright v. Remington*, 41 N. J. L. 53, Reed, J., said: "The common law, however, very early guarded the stability of contracts by a rule which required the exercise of a much higher degree of coercive force than here appears before the question of want of the power of consent could be entertained as a question of fact. The degrees of restraint or terror to which the party must be subjected, as a ground for avoiding his contract, must rise to what the law recognized as duress, and the statement of the grounds of such avoidance appears in the earliest books of authority. *Bac. Abr. Duress*."

"These grounds were stated in the case of *Sooy ads. State*, 9 Vroom, 329, and repetition of them here would be profitless. The language in the opinion in that case, although used in reference to the avoidance of a bond, is applicable to the avoidance of any contract, sealed or unsealed.

"In turning from the statement of

what is essential to constitute a defence upon the ground of duress to the facts in this case, it at once appears that they do not make a case within the rule laid down relative to such defence. There was no imprisonment of the woman or threat of imprisonment. There was no threatened injury to her person. The influence was that her husband threatened not to injure her, but to kill himself. It is true that there is the statement in the books that duress to a wife will avoid a deed made by the husband under that influence. *Bac. Abr. Duress*, B.

"It may be that had the payees of the note or their agent threatened to take the life of the husband unless the wife signed the note, and she signed under the influence of the terror excited by such threats, it would have avoided the contract. But here the threats were made by the husband against his own life. The maker and the object of the threats were the same. Their execution was within his own power of volition. The wife knew that no harm could come to him except by his own act. The present case is



action on a promissory note by the payee against the maker, it was set up as a defence that the plaintiff obtained the note by threatening the defendant, who was an aged man in ill health, about leaving Knoxville, Tennessee, for his home in Maine, with arrest, the note being for a debt due by the maker's son. There was no menace of violence proved, however, and no pretence that process authorizing an arrest had been procured, nor was there any officer of the law in attendance. It was held that the note was not avoided on ground of duress.<sup>1</sup>—Nor do threats of a mere trespass amount to duress.<sup>2</sup>—It used to be held that a threat of burning a house would not avoid a contract it produced;<sup>3</sup> but, as Mr. Chitty well observes, "it may be doubted whether a threat to commit so serious an injury would not be considered sufficient duress to avoid a contract obtained by means thereof."<sup>4</sup> When, however, imprisonment or great violence to the person is threatened, no matter what such violence may be, this avoids a contract obtained by such threat;<sup>5</sup> and even where imprisonment is lawful, duress may be constituted by the application of undue force, or by unjustifiable pressure, such as withholding of food.<sup>6</sup> But the fact that a contract was made by a party in prison does not by itself avoid it unless undue force or improper influence was used to extort it.<sup>7</sup>

utterly unlike an instance of the presence of some overshadowing danger, uncontrollable by either the wife or the person endangered.

"There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife, or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious."

<sup>1</sup> *Seymour v. Prescott*, 69 Me. 376.

<sup>2</sup> *R. v. Southerton*, 6 East, 140; *Bingham v. Sessions*, 6 Sm. & M. 13.

<sup>3</sup> *Bac. Abr. Duress (A)*.

<sup>4</sup> 1 Ch. on Cont. 11th Am. ed. 272.

<sup>5</sup> *Infra*, § 150; *Taylor v. Jacques*, 106 Mass. 291. That imprisonment,

even in a public prison, constitutes duress, if the imprisonment be unlawful, see *Smith v. Monteith*, 13 M. & W. 427; *Soule v. Bonney*, 37 Me. 128; *Tilley v. Damon*, 11 Cush. 247.

<sup>6</sup> 2 Inst. 482; *Smith v. Monteith*, 13 M. & W. 427, 438, 442; *Williams v. Brown*, 3 B. & P. 69; *R. v. Southerton*, 6 East, 140; *Pole v. Harrobin*, 9 East, 417.

<sup>7</sup> *Infra*, § 150; 1 Ch. on Con. 11th Am. ed. 270; *Stepney v. Lloyd*, Cro. Eliz. 647; *Kelsey v. Hobby*, 16 Pet. 269; *Crowell v. Gleeson*, 1 Fairf. 325; *Bowker v. Lowell*, 49 Me. 429; *Shepherd v. Watrous*, 3 Caines, 166; *Stouffer v. Latshaw*, 2 Watts, 167.

§ 149. Mere detention of goods, it has been frequently held, does not, in cases where this injury can be compensated for by a cross suit, constitute such duress as will invalidate a promise made in order to release the goods.<sup>1</sup> But whatever may be held to be the efficacy of a promise made under duress of goods, a party may recover back money paid under such duress.<sup>2</sup> Hence, excessive charges made by a railroad or express company, and paid in order to obtain goods or avoid expulsion from carriage, may be recovered back;<sup>3</sup> and so generally may money unlawfully detained.<sup>4</sup>—The refusal, therefore, of the charterer of a vessel to clear her after she is loaded and in the stream, unless certain concessions are made him, is duress, and the charterer cannot avail himself of such concessions.<sup>5</sup> As a general rule,

Duress of goods does not invalidate promise.

<sup>1</sup> *Infra*, §§ 737–8; 1 Ch. on Cont. 11th Am. ed. 206; *Atlee v. Backhouse*, 3 M. & W. 642; *Skeete v. Beale*, 11 A. & E. 983; *Neilson v. McDonald*, 6 John. Ch. 201; *James v. Roberts*, 18 Ohio, 548; *Elston v. Chicago*, 40 Ill. 514; *Spaids v. Barrett*, 57 Ill. 289; *Macloon v. Smith*, 49 Wis. 200; *Hunt v. Bass*, 2 Dev. Eq. 292; *Collins v. Westbury*, 2 Bay, 211; *Lehman v. Shackelford*, 50 Ala. 437; *Bingham v. Sessions*, 6 Sm. & M. 13; see *contra*, *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211.

<sup>2</sup> *Oates v. Hudson*, 6 Exch. 348; *French v. Shoemaker*, 14 Wall. 314; *U. S. v. Huckabee*, 16 Wall. 414; *Chase v. Dwinel*, 7 Greenl. 134; and cases cited *infra*, §§ 737–8. As to extortion by strikes see *infra*, § 439.

<sup>3</sup> *Infra*, § 738; *Garton v. R. R.*, 28 L. J. Exch. 169; *Riddington v. R. R.*, 27 L. J. C. P. 295; *Evershed v. R. R.*, L. R. 2 Q. B. D. 254; *Ashmole v. Wainwright*, 2 Q. B. 837; *Harmony v. Bingham*, 12 N. Y. 99.

<sup>4</sup> *Infra*, §§ 742 *et seq.*; *Astley v. Reynolds*, 2 Str. 915; *Wakefield v. Newton*, 6 Q. B. 676; *Chandler v. Sanger*, 114 Mass. 364; *Foshay v. Ferguson*, 5

Hill, 154; *Briggs v. Boyd*, 56 N. Y. 289; *Baldwin v. St. Co.*, 74 N. Y. 125; *Stover v. Mitchell*, 45 Ill. 213; *Waller v. Parker*, 5 Cold. 496. “In *Miller v. Miller*, 18 P. F. Smith (68 Penn. St. § 486), it is said that in civil cases the rule as to duress *per minos* has a broader application at the present day than formerly. Where a party has the property of another in his power, so as to enable him to exert his control over it to the prejudice of the owner, a threat to use this control may be in the nature of the common-law duress *per minas*, and enable the party threatened with this pernicious control to avoid a bond or note obtained without consideration, by means of such threats. The constraint that takes away free agency and destroys the power of withholding assent to a contract must be one that is imminent, and without immediate means of protection, and such as would operate on the mind of a person of reasonable firmness.” *Sterrett, J. Motz v. Mitchell*, 91 Penn. St. 117. See on this topic notes in 21 Am. Law Reg. 115.

<sup>5</sup> *McPherson v. Cox*, 86 N. Y. 472; citing *Harmony v. Bingham*, 12 N. Y.

also, a party may recover back goods or money illegally extorted by a bailee refusing to return such goods or money without

99; *Scholey v. Mumford*, 60 N. Y. 98; 64 N. Y. 121. "The master of the vessel," said Danforth, J., "testified, and I do not find his evidence contradicted, that after the vessel was laden in the stream, ready for sea, the plaintiff applied to him to sign the draft and the agreement, that the captain resisted upon the ground that the tare, etc., should be first allowed, as required at the port of delivery, but the plaintiff, as the captain testifies, said he 'would not clear the ship from the customs, settle my business, or allow me to proceed without the signature of these papers,' and then the captain says he was 'compelled to sign them.' The plaintiff was the agent of the owners of the vessel, the shipper and consignor of the goods. He, and no other person, could get clearance for the vessel at the custom-house (U. S. Rev. Stat. § 4200), and that exclusive power and the refusal to exercise it was constraint. To make the contract unlawful, it was not necessary that the person of the master should have been arrested, or his goods or vessel seized or libelled. It is enough that the contracts which he then entered into were made to procure the liberation of the vessel, and their execution might well be imputed to illegal restraint. The learned court should, therefore, have charged as requested by the defendant's counsel, that if 'the jury believed the testimony given by the captain, as to the circumstances under which the bill was executed, and that there was no way for him to leave the port with the vessel or cargo without the consent of the plaintiff, the refusal of the plaintiff to allow the vessel to leave the port until the bill was signed, did constitute duress.' The

confinement by reason of the plaintiff's refusal to do the thing which should clear or let go the vessel was as coercive and difficult to resist as an actual seizure or imprisonment would have been, and under the construction given by us to the charter-party the refusal was unlawful, for it was an omission of duty."

In *Pemberton v. Williams*, 87 Ill. 16, A., the assignee of a purchaser of land, having contracted to sell the land to E., who demanded to see A.'s deed therefor, was compelled to pay the original vendor more than was due him, in order to get a deed to satisfy E., and the payment was made under protest. It was held to be a question of fact for the jury, whether the payment was made under a moral duress; and if so, the excess above the real sum due might be recovered back in assumpsit under the common counts. See generally to same effect *Miller v. Miller*, 68 Penn. St. 493; *Spaids v. Barrett*, 57 Ill. 289; *Bennett v. Ford*, 47 Ind. 264; *Crawford v. Cato*, 22 Ga. 594; *Bingham v. Sessions*, 6 Sm. & M. 13.

In *Atlee v. Backhouse*, 3 M. & W. 650, Parke, B., said: "There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of these goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is one case in *Viner's Abridgment* to the contrary (9 Vin. Abr. 317, *Duress*, B. 3; 1 Roll. Abr. 587, 20 Ass. 14), that, in order to avoid a contract by reason

such contribution.<sup>1</sup> Money illegally obtained by a public officer may in this way be recovered back, when paid under compulsion or under protest;<sup>2</sup> and so of money extorted illegally as toll;<sup>3</sup> and so where illegal commissions are extorted by a refusal otherwise to surrender securities.<sup>4</sup> On the same principle goods illegally exacted by a collector of the revenue, on summary process, can be recovered back.<sup>5</sup> "Nor is the principle confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example, when a corporation refuses to suffer a lawful transfer of stock

of duress, it must be duress of a man's person, not of his goods; and it is so laid down in *Shepherd's Touchstone* (p. 61); but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that, being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress."

Duress of goods also exists "where one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession, but refuses to surrender them unless the exaction is submitted to." *Gooley, J., Hackley v. Headley*, 45 Mich. 569; see *infra*, §§ 439, 737-8.

<sup>1</sup> *Smith v. Bromley*, Doug. 696; *Ashmole v. Wainwright*, 2 Q. B. 837; *Oates v. Hudson*, 6 Exch. 346; *Shaw v. Woodcock*, 7 B. & C. 73; *Maxwell v. Griswold*, 10 How. 242; *Silliman v. U. S.*, 101 U. S. 465; *Chase v. Dwinel*, 7 Greenl. 134; *Sartwell v. Horton*, 28 Vt. 370; *Wilcox v. Howland*, 23 Pick. 167; *Cobb v. Charter*, 32 Conn. 358;

*Collins v. Westbury*, 2 Bay, 211; *Harvey v. Olney*, 42 Ill. 336; *Alston v. Durant*, 2 Strobb. 257. That threats of destruction of goods may avoid a promise thus coerced, see *Foshey v. Ferguson*, 5 Hill, 158.

<sup>2</sup> *Dew v. Parsons*, 2 B. & Ald. 562; *Ogden v. Maxwell*, 3 Blatch. 319; *Cunningham v. Munroe*, 15 Gray, 471; *Harmony v. Bingham*, 12 N. Y. 99; *Allentown v. Saeger*, 20 Penn. St. 421; *White v. Heylman*, 34 Penn. St. 142; *American St. Co. v. Young*, 89 Penn. St. 186; *Deal v. Martin*, 1 Phila. 500; *Tenbrook v. Phila.*, 7 Phila. 105; *Els-ton v. Chicago*, 40 Ill. 514; *Sasportas v. Jennings*, 1 Bay, 470; *Quinnett v. Washington*, 10 Mo. 53; *Laterade v. Kaiser*, 15 La. Ann. 296. As to payment to tax collectors see *infra*, § 737.

<sup>3</sup> *Chase v. Dwinel*, 7 Greenl. 134.

<sup>4</sup> *Scholey v. Mumford*, 60 N. Y. 498. As to payment under protest see *infra*, § 737.

<sup>5</sup> *Irving v. Wilson*, 4 T. R. 485; *El-liott v. Swartwout*, 10 Pet. 138; *Mariott v. Brune*, 9 How. U. S. 619; *Maxwell v. Griswold*, 10 How. U. S. 242; and cases cited *infra*, § 738. That taxes paid under protest may thus be recovered, see *infra*, § 738.

till the exaction is submitted to;<sup>1</sup> or a creditor withholds his certificate from a bankrupt.<sup>2</sup> And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it.<sup>3</sup> But where the party threatens nothing which he has not a legal right to perform, there is no duress.<sup>4</sup> When, therefore, a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress."<sup>5</sup> —But it is not duress of goods to pay money to redeem goods from the custody of the law;<sup>6</sup> unless the execution or attachment be one which the plaintiff knows is without cause of action.<sup>7</sup> Nor is it duress of goods where a creditor accepts a less sum than his just demand, when due, being at the time financially straitened, the money being accepted to avert immediate insolvency; the fact that the debtor knew of his creditor's circumstances, and availed himself of them by refusing to pay at all except at the reduced amount, not constituting duress of goods.<sup>8</sup> Where, also, O., on selling a house, before delivery of possession claimed the right to remove certain fixtures, which was disputed by P., the purchaser, and on O.'s threatening to remove them, P. gave his note to O. for their value, it was held that this note could not be avoided on ground of duress.<sup>9</sup>—S., who was the owner of certain barges, having executed charter parties of them to the United States, at a fixed monthly price, as long as they were kept in service, was informed, after they had been used for some time, that he must execute a new contract, at a re-

<sup>1</sup> *Bates v. Ins. Co.*, 3 Johns. Cas. 238.

<sup>2</sup> *Smith v. Bromley*, Doug. 670.

<sup>3</sup> *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Penn. St. 433; *First Nat. Bank v. Watkins*, 21 Mich. 483.

<sup>4</sup> *Skeate v. Beale*, 11 Ad. & E. 983; *Preston v. Boston*, 12 Pick. 14.

<sup>5</sup> *Wilcox v. Howland*, 23 Pick. 167.

Cited by Cooley, J., *Hackley v. Headley*, *ut supra*, 45 Mich. 569, 21 Am. Law Reg. 109, with a valuable note by Mr. Elwell.

<sup>6</sup> *Liverpool Marine Co. v. Hunter*, 1 L. R. 3 Ch. 479.

<sup>7</sup> *Chandler v. Sanger*, 114 Mass. 364; see *Spaids v. Barrett*, 57 Ill. 289.

<sup>8</sup> *Hackley v. Headley*, *ut supra*.

<sup>9</sup> *Heysham v. Dettre*, 89 Penn. St.

duced price. This S. declined to do, and demanded the barges, which was refused. He was informed that it was the intention of the quartermaster-general to retain possession without compensation, upon which he executed the new contract, stating that he did so under protest, compelled by financial necessity. The subsequent payments due him on the new contracts were received by him without protest. It was held by the supreme court of the United States that the new contract could not be regarded as void from duress, and that he could not, therefore, recover from the United States the difference between the price allowed under the old contract and that allowed and paid under the new contract.<sup>1</sup>

§ 150. It is no defence to a suit upon a contract that it was executed by the defendant for the purpose of com-  
 Nor fear of legal pro- promising a civil suit threatened or impending,  
 procedure. even though he was at the time under arrest.<sup>2</sup> A  
 party who has a just claim against another has a right to threaten the legal proceedings appropriate for the enforcement of such claim, and to withdraw such proceedings on obtaining satisfaction; and if no unfair advantage be taken, and no illegal pressure applied, the use of such process, no matter how severe, cannot constitute duress. So speak the Roman standards,<sup>3</sup> and we have numerous authorities in our own law to the same effect.<sup>4</sup> "Should the party choose to

<sup>1</sup> Silliman v. U. S., 101 U. S. 465.

<sup>2</sup> Bac. Ab. Duress, B; 1 Bl. Com. 131; Biffin v. Bignell, 7 H. & N. 877; Bates v. Butler, 46 Me. 387; Alexander v. Pierce, 10 N. H. 494; Robinson v. Gould, 11 Cush. 55; Stouffer v. Lathshaw, 2 Watts, 167; Brooks v. Barryhill, 20 Ind. 97; Taylor v. Cottrell, 16 Ill. 93; Plummer v. People, 16 Ill. 358; Mayhew v. Ins. Co., 23 Mich. 105; Landa v. Obert, 45 Tex. 539. That a compromise of doubtful claims is a good consideration, see *infra*, § 533.

<sup>3</sup> L. 7, pr. D. quod metus causa (IV. 2); L. 13, § 1, D. de injur. XLVII. 10.

<sup>4</sup> *Supra*, § 148; *infra*, §§ 532 et seq.;

1 Roll. Abr. 688; Kelsey v. Hobby, 16 Pet. 269; Eddy v. Herrin, 17 Me. 338; Smith v. Reedfield, 27 Me. 145; Crowell v. Gleason, 1 Fairf. 325; Bowker v. Lowell, 49 Me. 429; Watkins v. Baird, 6 Mass. 511; Wilcox v. Howland, 23 Pick. 167; Shephard v. Watrous, 3 Caines, 166; Harmony v. Bingham, 1 Duer, 229; Miller v. Miller, 68 Penn. St. 486; Waterman v. Barratt, 4 Harring. 311; Mayor v. Lefferman, 4 Gill, 425; Rood v. Winslow, 2 Dougl. (Mich.) 68; Taylor v. Cottrell, 16 Ill. 93; Meek v. Atkinson, 1 Bailey, 84; Smith v. Atwood, 14 Ga. 402; Bingham v. Sessions, 6 Sm. & M. 13; Holmes v. Hill, 19 Mo. 159; see Felton v. Gregory, 130 Mass. 176.

make terms instead of pursuing his rights (at all events when there is nothing to prevent him from so doing), he cannot afterwards turn round and complain that the terms were forced on him."<sup>1</sup> "If a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned (in a civil suit), and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although, in fact, the plaintiff had no cause of action."<sup>2</sup> On the other hand, if the suit on which the arrest was made was without cause of action, and was fraudulently designed to extort, or was without lawful authority, a promise obtained by the pressure thus applied is invalid.<sup>3</sup> This was held to be the case when a bond for the maintenance of a bastard child was given under the pressure of a procedure not authorized by law.<sup>4</sup> And if an unjust claim be collected under stress of an arrest, the money can be afterwards recovered back.<sup>5</sup> And a threat of illegal arrest or attachment is duress.<sup>6</sup> Thus where a married woman, to save property owned by her from seizure on an execution issued against her husband, paid money to the officer levying the execution, it was held that she could recover back from the officer the money paid.<sup>7</sup>

§ 151. It is against the policy of the law that criminal prosecutions should be used to collect private debts; and in the Roman law this abuse was stigmatized as concussion, and was held to vitiate all contracts

Threat of criminal prosecution avoids.

<sup>1</sup> Pollock, 3d ed. 566, citing *Silliman v. U. S.*, 101 U. S. 468.

<sup>2</sup> *Parsons, C. J., Watkins v. Baird, ut supra.* And see *Soule v. Bonney*, 37 Me. 128; *Smith v. Atwood*, 14 Ga. 402.

<sup>3</sup> *Baker v. Morton*, 12 Wall. 150; *Richardson v. Duncan*, 3 N. H. 508; *Cumming v. Ince*, 11 Q. B. 112; *Kavanagh v. Sanders*, 8 Greenl. 426; *Osborn v. Robbins*, 36 N. Y. 365; *Stouffer v. Latshaw*, 2 Watts, 165; *Phelps v. Zuschlag*, 34 Tex. 371.

<sup>4</sup> *Fisher v. Shattuck*, 17 Pick. 252;

see *Bane v. Detrick*, 52 Ill. 19; *Seiber v. Price*, 26 Mich. 518.

<sup>5</sup> 1 Chitty on Cont. p. 207; Story on Cont. §§ 510-512, citing *Severance v. Kimball*, 8 N. H. 386; *Whitefield v. Longfellow*, 13 Me. 146; *Fisher v. Shattuck*, 17 Pick. 252. In *Norton v. Danvers*, 7 T. R. 376, Lord Kenyon held that, if a person was held to bail on an insufficient affidavit, the bail bond could be invalidated on ground of duress.

<sup>6</sup> *Taylor v. Jaques*, 106 Mass. 291.

<sup>7</sup> *Coady v. Curry*, 8 Daly, 58.

which it compelled.<sup>1</sup> Such is the rule in our own law.<sup>2</sup> On the other hand, the mere fact that a contract was made, by a defendant under criminal prosecution with the prosecutor, does not avoid the contract.<sup>3</sup>—E., employed as a gold refiner, on being accused of embezzling gold given to him by his employers to refine, agreed, when under arrest, to pay back the amount taken, by means of a mortgage. There was no bargain not to prosecute him, nor any agreement shown to the effect that his punishment would be less heavy should he refund. It was held that the mortgage was valid.<sup>4</sup>—The difference between civil and criminal process in this respect is this: that the former can be used expressly to collect a debt, while the latter cannot. The reason for the distinction is this: Civil suits are designed for the purpose of collecting debts, and it is not only lawful but proper to use such suits as engines of compromise. But to compound a criminal prosecution is in itself an indictable offence, and a contract to commit a criminal offence is voidable as against the policy of the law.<sup>5</sup> Hence it is duress to threaten a prosecution for burglary, and thereby obtain money,<sup>6</sup> or to use any other criminal process to extort money.<sup>7</sup>

§ 151 a. Promises extorted under the threat of the criminal prosecution of near relatives are to be subjected to the same tests. Thus it is held a defence to a suit on a mortgage or other obligation that it was executed by a wife to save her husband from prosecution for false pretences;<sup>8</sup> or for embezzlement;<sup>9</sup> or for any other indictable offence.<sup>10</sup> A court of equity, also, while it

So of criminal prosecutions of near relatives.

<sup>1</sup> L. 2, D. de conuisione (xlvi. 13); L. 8, L. 1, § 3, D. de calumniator (iii. 6); L. 2, pr., L. 4, § 2, D. de cond. ob turp. causam (xii. 5).

<sup>2</sup> Richardson v. Duncan, 3 N. H. 508; Tilley v. Damon, 14 Cush. 247; Osborn v. Robbins, 36 N. Y. 365; Snyder v. Braden, 58 Ind. 143; Schulz v. Culbertson, 49 Wis. 122; and cases cited, *infra*, §§ 483 et seq.

<sup>3</sup> See *infra*, §§ 483 et seq.

<sup>4</sup> Smillie v. Titus, 32 N. J. Eq. 51.

<sup>5</sup> *Infra*, §§ 483 et seq.

<sup>6</sup> Schulz v. Culbertson, 46 Wis. 313; S. C. 49 Wis. 122.

<sup>7</sup> *Infra*, § 483; Heckman v. Swartz, 50 Wis. 267. See, as to pleading, Holbrook v. Cooper, 44 Mich. 373.

<sup>8</sup> McMahon v. Smith, 47 Conn. 221.

<sup>9</sup> Riddle v. Hall, Sup. Ct. Penn. 1881; Singer Co. v. Rawson, 50 Iowa, 634.

<sup>10</sup> Metc. on Cont. 280; Robinson v. Gould, 11 Cush. 55.



will not set aside a deed by a married woman on the ground that she executed it to relieve her husband from arrest, will not compel the performance of a contract so induced.<sup>1</sup> It has been held in England that, where a father whose name had been forged by his son was induced by threats of the son's prosecution to promise to pay the debt, the promise was void as made under illegal compulsion.<sup>2</sup> And in Massachusetts, in 1881, a mortgage executed by a father to save his son from a threatened prosecution for forgery was held void.<sup>3</sup>—In Con-

<sup>1</sup> *Smith v. Rowley*, 66 Barb. 502; *Compton v. Bank*, 96 Ill. 301.

In *Whitmore v. Farley*, 45 L. T. (N. S.) 99 (Ct. of App. May, 1881), C. was arrested at the instance of P. on the charge of having committed the offence of larceny by a bailee. C. was brought up before a magistrate and remanded. C.'s wife then induced P. to withdraw from the prosecution on C.'s wife agreeing to charge her separate real estate with the amount taken. The magistrate, at a subsequent hearing, being informed of the terms, allowed the prosecution to be withdrawn. C.'s wife afterwards refused to perform her agreement. P. brought an action to enforce the charge, and C.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her. It was held (affirming the decision of Fry, J., 43 L. T. (N. S.) 192) that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for delivery of the deeds. Citing *Williams v. Bayley*, 1 H. L. 200; *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Davis v. Holding*, 1 M. & W. 159. For other cases, see *infra*, § 148.

<sup>2</sup> *Williams v. Bayley*, L. R. 1 H. L. 200. See, to the same effect, *Shenk v. Phelps*, 6 Ill. Ap. 612; *Schultz v. Culbertson*, 46 Wis. 313; *Coffman v. Bk.*, 5 Lea, 232; but see *Seymour v. Prescott*, 69 Me. 376, cited *supra*, § 148.

<sup>3</sup> *Harris v. Carmody*, 131 Mass. 51.

"The question," said Morton, J., "whether this exception extends to the relation of parent and child, does not appear to have been expressly adjudicated. But we find many dicta of judges and statements of authors entitled to great respect, which show that from the earliest times it has been considered as the settled law that the relation of parent and child was within the exception. See the remarks of Lord Coke in *Baylie v. Clare*, 2 Brownl. 275, 276; s. c. 1 Rolle Abr. 687, pt. 4-6; and of Lord Bacon in *Bac. Max. reg.* 18. The same rule is explicitly laid down without question by the author of *Bacon's Abridgment*, and by Mr. Dane, and by Mr. Justice McLean. *Bacon Abr. Duress*, B.; *Dane Abr.* 166, 375; *McClintick v. Cummins*, 3 McLean, 158, 159. See, also, the remarks of Wylde, J., and of Twisden, J., in *Wayne v. Sands*, 1 Freem. 351. This case is too imperfectly reported to be of great weight, and the remarks attributed to Twisden, J., would exclude the case of husband and wife in opposition to all the authorities. See the same case under the name *Warn v. Sandown*, 3 Keb. 238. We are not referred to any modern authorities opposed to the views of the learned judges and authors whom we have cited. The exception in favor of husband and wife is not based solely upon the legal fic-

necticut, in 1879, we have a ruling still further extending the protection. D., a town treasurer in that state, having become a defaulter, a selectman of the town visited D.'s aged maiden aunt and informed her that D. had subjected himself to conviction of a state's prison offence. He then left her, and a short time afterwards returned with a lawyer with a draft of a mortgage to the town of certain real estate she owned, which mortgage she signed in great distress of mind, without taking any advice from her friends, in the belief that this was the only means of averting the prosecution. It was held that the mortgage was under the circumstances invalid.<sup>1</sup> Under the same head fall agreements to compound felonies wherever the agreement is extracted from one party by a threat of the other to prosecute for a crime.<sup>2</sup> At the same time the settlement of a private civil suit is not precluded by

tion that they are in law one person, but rather upon the nearness and tenderness of the relation. The substantial reasons of the exception apply as strongly to the case of a parent and child as to that of a husband and wife. No more powerful and constraining force can be brought to bear upon a man, to overcome his will, and extort from him an obligation, than threats of great injury to his child. Both upon reason and the weight of the authorities, we are of opinion that a parent may avoid his obligation by duress to his child, and, therefore, that the ruling of the court below on this point was correct."

See, to the same general effect, *National Bank v. Kirk*, 90 Penn. St. 49, and *Kiewert v. Rindskopf*, 46 Wis. 481. It is remarkable that *Williams v. Bayley*, L. R. 1 H. L. 200, above cited, escaped the notice of counsel and court in *Harris v. Carmody*.

In *Secar v. Cohen* (Q. B. D. 1881), 45 L. T. N. S. 589, the plaintiff, by his agents, made representations to the defendants that criminal charges,

under the Debtor Act, 1869, could and were about to be brought against the bankrupt, C., who was the son of one defendant and nephew of the other. The defendants, induced by this threat, gave certain notes to the plaintiff. The defendants swore on the trial that they had believed these representations to be true, and would not have given the promissory notes had they not so believed. In an action by the trustee against the defendants as makers of the promissory notes, it was held, after a verdict for the plaintiff, that judgment should be entered for the defendants on the ground that they had been induced to enter into the contract by duress, and threats of criminal proceedings; and that it was not necessary that any particular charge under the Debtor Act should have been specified, or that any ground for such charge should have existed in fact. The court relied on *Williams v. Bayley*, L. R. 1 H. L. 200; *Hamilton v. Johnson*, L. R. 5 Q. B. D. 263.

<sup>1</sup> *Sharon v. Gager*, 46 Conn. 189.

<sup>2</sup> See *infra*, § 483.

the fact that a criminal prosecution may be sustained for the act for which the suit is brought.<sup>1</sup>

§ 152. There must be shown, in order to make out this defence, to have been a causal connection between the duress and the consent. The mere fact that a man is under duress does not avoid all promises made by him; it must be shown, to produce this avoidance, that the duress caused the promise.<sup>2</sup>

Must be causal relation between the duress and the consent

Duress, also, *after* the promise, will not avoid.<sup>3</sup> But when the promise is produced by the duress, then, under the limitation above stated, the duress avoids the promise.

§ 153. If a promise is extorted by duress, it makes no matter whether the duress was applied by the promisee, or by a third party. "In hac actione non quæritur, utrum is, qui convenitur, an alius metum fecit; sufficit enim hoc docere, metum sibi illatum, vel vim, etc."<sup>4</sup> Hence duress by a stranger at the suggestion of the party benefited avoids a contract thus extorted.<sup>5</sup> But the duress must have been used by the party applying it to procure the promise, and the promisee must knowingly avail himself of this means of extortion. It is no defence, therefore, so it has been held in the Roman law, that the promise sued upon was made in consideration of rescue from duress for which the promisee was in no sense responsible.<sup>6</sup> Hence a false statement that other persons threaten a prosecution is not duress when it is not pretended that there is any authorization from such other persons.<sup>7</sup>

Person from whom duress proceeds immaterial.

§ 154. We have already seen<sup>8</sup> that whether a promise extorted by duress is absolutely void, and incapable of ratification, or whether it is merely voidable, and hence open to ratification, depends upon whether consent was given. If there was no consent (*e. g.*, when the

Such contracts may be ratified.

<sup>1</sup> *Infra*, § 486.

<sup>4</sup> L. 14, § 3, D. eod. L. 9, § 8, D.

<sup>2</sup> Westphal, *metus tum tantum vitiat, si ab altero ideo incussus, ut contrahatur*, Koch, ii. 105. *Silliman v. U. S.*, 101 U. S. 465; *Shephard v. Watrous*, 3 Caines, 166; *Eddy v. Herrin*, 17 Me. 338; *Heaps v. Dunham*, 95 Ill. 583.

eod.

<sup>5</sup> Keilw. 154 *a*.

<sup>6</sup> L. 9, § 1, in f. D. h. t. L. 34, § 1, D. de donet. xxxix. 5; Pauli, sent. rec. Lib. v. T. 11, § 6.

<sup>7</sup> *Fulton v. Hood*, 34 Penn. St. 365.

<sup>3</sup> *Fulton v. Loftus*, 63 N. C. 393.

<sup>8</sup> *Supra*, § 145.

party was in a stupor, or when his hand was by force made to sign a mark), then the whole transaction is a nullity. But where there is consent, this consent holds until avoided, which must be, in the Roman law, *ope exceptionis*.<sup>1</sup> Hence, by this law, such consent is capable of ratification, which ratification relates back to the original promise. In those systems in which such promises are *ipso jure* null and void, they are incapable of ratification.<sup>2</sup> Our own law follows in this respect the Roman, holding that while a paper signed under physical compulsion is a nullity, a promise made under duress is *prima facie* valid. To avoid its effect it must be repudiated by the promisor and annulled by the proper tribunal. And repudiation may be precluded by ratification at a time when the duress is removed. This ratification may be by accepting the fruits of the bargain as well as by express assumption of its burdens.<sup>3</sup>

<sup>1</sup> L. 2 and 4 C. h. t.

<sup>2</sup> Koch, *op. cit.* ii. 113.

<sup>3</sup> Shepp. Touch. 61, 288; Parsons on Cont. i. 437; Matthews *v.* Baxter, L. R. 8 Ex. 132; Worcester *v.* Eaton, 13 Mass. 377; Montgomery *v.* Pickering,

116 Mass. 227; Hassler *v.* Bitting, 40

Penn. St. 68; Veach *v.* Thompson, 15

Iowa, 380. For ratification in cases of undue influence, see *infra*, § 168. That ratification is to be inferred from facts, see *supra*, §§ 58 *et seq.*

## CHAPTER IX.

## UNDUE INFLUENCE AND IMPOSITION.

That promisor is under influence of promisee does not invalidate promise, § 157.	When voluntary donation is set up, burden is on party claiming, § 164.
Nor does great mental superiority of promisee over promisor, § 158.	Gross inadequacy of price may lead to inference of fraud, § 165.
Otherwise when position of superiority is used to extort unfair advantage, § 159.	In such cases specific performance will be refused, § 166.
Courts of equity take peculiar cognizance of such breaches of trust, § 160.	Party's representatives may contest, § 167.
Rule applies wherever there are authoritative or fiduciary relations, § 161.	Such contracts may be ratified, § 168.
Influence when established presumed to continue, § 162.	Necessity of heir expectant may conduce to unfair dealing, § 169.
Question one of burden of proof, § 163.	Extortionate contracts made more open to revision by repeal of usury laws, § 170.

§ 157. WE have already seen that in the Roman law *metus reverentialis*, or reverential awe, does not invalidate a contract made under its influence.<sup>1</sup> A father, for instance, may use his influence over a son to induce the latter to make a settlement of his estate in trust; a brother may use his influence over a dependent and weak-minded sister to induce her to make stable and judicious investments of her estate; and such exercises of authority, when equitable in their results, will be regarded not only as unobjectionable but as laudable.<sup>2</sup> Even gifts from child to parent, from inferior to superior, will be sustained, when these gifts are free, and suitable to the circumstances of the parties. "This court," so it was said in an English case of this class, "does not interfere to prevent an act even of bounty between parent and child, but it will take care (under

That the promisor is under the influence of the promisee does not invalidate promise.

<sup>1</sup> *Supra*, §§ 145 *et seq.*

<sup>2</sup> As to limitation in cases of fraud see *infra*, § 376.

the circumstances in which the parent and child are placed before the emancipation of the child), that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."<sup>1</sup> And reasonable dispositions of property, conducive to fair family settlements, will be upheld as between parent and child.<sup>2</sup> But the excuse of family convenience will not justify a conveyance by which a son improvidently gives up, without consideration, a valuable estate to his father,<sup>3</sup> or a conveyance in fraud of creditors.<sup>4</sup>

§ 158. Should mental disparity between the parties avoid a contract, there are few contracts that would stand, and few men of great business capacity that would be capable of doing business. Whenever a man of this class should make a bargain, unless in the very rare cases of bargains among his intellectual equals, it would be the duty of the courts to set it aside; and the men most capable of advancing the interests of the community by their far-sightedness and their sagacity would be under an interdict. But such a restraint on superior intelligence would be not only unwise but impracticable; and the courts, supposing there be no fraud, and no abuse of authority or of trust, have refused to set aside bargains merely because one party, by means of superior intelligence, obtained an advantage over the other.<sup>5</sup> The converse also is true, that the men-

<sup>1</sup> *Archer v. Hudson*, 7 Beav. 560; see *Jenkins v. Pye*, 12 Pet. 253; *Hawkins' App.*, 32 Penn. St. 263; *Millican v. Millican*, 24 Tex. 426.

<sup>2</sup> *Jenner v. Jenner*, 2 Giff. 232, 2 De G. F. & J. 359; *Hartopp v. Hartopp*, 21 Beav. 259; *Williams v. Williams*, L. R. 2 Ch. 294.

<sup>3</sup> *Savery v. King*, 5 H. L. C. 627, cited *Pollock*, 534.

<sup>4</sup> *Infra*, §§ 376 *et seq.*

<sup>5</sup> *Bispham's Eq.* § 230; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Mann v. Betterly*, 31 Vt. 326; *Allen ex parte*, 15 Mass. 58; *Hallenbeck v. Dewitt*, 2

*Johns*. 404; *Stiner v. Stiner*, 58 Barb. 643; *Graham v. Pancoast*, 30 Penn. St. 89; *Nace v. Boyer*, 30 Penn. St. 79; *Aiman v. Stout*, 42 Penn. St. 114; *Hyer v. Little*, 5 C. E. Green, 443; *Losear v. Shields*, 8 C. E. Green, 509; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Darnell v. Rowland*, 30 Ind. 342; *Rogers v. Higgins*, 57 Ill. 247; *Beverley v. Waldon*, 20 Grat. 147; *Hadley v. Latimer*, 3 Yerg. 537; *Rippy v. Gant*, 4 Ired. Eq. 443; *Paine v. Roberts*, 82 N. C. 451; *Thomas v. Shepard*, 2 McCord Eq. 36; *Killian v.*

tal inferiority of a party to a contract is by itself no ground for setting such contract aside. Were it otherwise, persons with intellectual gifts below the average would be incapable of any business whatsoever.<sup>1</sup> At the same time, when there is fraud or undue influence exerted by a party obtaining a contract in his favor, proof of a comparatively slight degree of mental imbecility is required to set aside a contract induced by such influence.<sup>2</sup>

§ 159. Equity will not permit a position of authority or influence to be used to extort unfair advantages. Whenever there is ascendancy on the one side, and mental inferiority and subjection on the other, promises in which this ascendancy is used to extort unfair advantages will be held invalid. Dominion, whatever it may be, exercised so as to wring unrighteous concessions from the person controlled to the person controlling will be a ground for equitable relief.<sup>3</sup> “The acts and contracts

Otherwise when position of superiority is used to extort unfair advantage.

Badgett, 27 Ark. 166; Biglow v. Leabo, 8 Oregon, 147. As to limitation in cases of fraud, see *infra*, §§ 232 *et seq.*

<sup>1</sup> See *supra*, § 103; Gratz v. Cohen, 11 How. U. S. 19; Howe v. Howe, 99 Mass. 88; Hallenbeck v. Dewitt, 2 Johns. 404; Mason v. Williams, 3 Munf. 126; Russell v. Russell, 4 Dana, 40; Smith v. Beatty, 2 Ired. Eq. 456; Lindsey v. Lindsey, 50 Ill. 79; Darnell v. Rowland, 30 Ind. 342; Galpin v. Wilson, 40 Iowa, 90.

<sup>2</sup> *Supra*, § 103; *infra*, §§ 232 *et seq.*

<sup>3</sup> Storey's Eq. Jur. 12th ed. § 238; Bispham's Eq. § 231; Nottidge v. Prince, 2 Giff. 246; Boyse v. Rossborough, 6 H. L. C. 2; Tate v. Williamson, L. R. 2 Ch. 61; Harding v. Harding, 11 Wheat. 103; Selden v. Myers, 20 How. 506; Allore v. Jewell, 94 U. S. 511; Whelan v. Whelan, 3 Cow. 537; Dunn v. Chambers, 4 Barb. 376; Hutchinson v. Tindall, 2 Green Ch. 357; Haydock v. Haydock, 33 N. J. Eq. 494; 34 N. J. Eq. 570; Hunt v. Moore, 2 Barr, 105; Davidson v. Little,

22 Penn. St. 245; Brady's Appeal, 66 Penn. St. 277; Highberger v. Stiffler, 21 Md. 338; Wiest v. Garman, 4 Houst. 119; Samuel v. Marshall, 3 Leigh, 567; Tracey v. Sacket, 1 Oh. St. 54; Wartemberg v. Spiegel, 31 Mich. 400; Norris v. Taylor, 49 Ill. 17; Talbott v. Hooser, 12 Bush, 408; Rippey v. Grant, 4 Ired. Eq. 443; Buffalow v. Buffalow, 2 Dev. & Bat. 241; Powell v. Cobb, 3 Jones Eq. 456; Rumph v. Abercrombie, 12 Ala. 64; Cadwallader v. West, 48 Mo. 483; Poston v. Balch, 69 Mo. 115. That a victim of fraud is not barred by complicity, see *infra*, § 353. That the inference of undue influence is strengthened by proof of mental inferiority of the promisor, see *supra*, § 104.—Mr. Pollock, 3d ed. 569, following Dew v. Parsons, 2 B. & Ald. 562, says, that in such cases “the question to be decided” “is whether the party was a free and voluntary agent.” This, however, is a mistake. A person under influence of one kind is as much, in the eye of the law, “a free and

of persons who are of weak understanding," to adopt the rule as given by Judge Story,<sup>1</sup> "and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion, that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome, by cunning, or artifice, or undue influence." And this is eminently the case when such persons are fraudulently influenced by persons of superior intellect.<sup>2</sup>

voluntary agent," as is a person under influence of another kind. Unless his capacity of choice is destroyed by insanity, or unless he is by physical force constrained to do or not to do a particular act, he is free, as Savigny shows in a passage already quoted, either to succumb to or to resist the influences brought to bear on him.— See *supra*, §§ 144 *et seq.*

<sup>1</sup> Eq. Jur. 12th ed. § 238.

<sup>2</sup> *Infra*, § 245; 1 Sug. V. & P. 8th Am. ed. 275; Whelan v. Whelan, 3 Cow. 535; Bunch v. Hurst, 3 Des. 292. That age itself does not afford a presumption of undue influence, see 1 Wh. & St. Med. Jur. § 90; Cowee v. Cornell, 75 N. Y. 91; Shaw v. Ball, 55 Iowa, 55. In *Cherbonnier v. Evitts*, Md. Ct. of App. 1881, we have the following from Ritchie, J. "The law is jealous to defeat a fraudulent use of the means afforded by intimacy of association. And it is not inconsistent with the exercise of undue influence or artifice that the instrument assailed was executed voluntarily and with a knowledge of its contents. The following cases are illustrative in this connection: In the case of *Huguenin v. Boseley*, 14 Ves. Jr. 275, before Lord Chancellor Eldon, in which the deed was impeached on the ground of undue influence and the confidential relation existing between the grantor and grantee, Sir Samuel Romilly argued

that 'the rule is not confined to attorneys or persons entitled to reward.' Proof v. Hines, For. 111, was the case of a tradesman who officiously interfered; the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. He cited *Hatch v. Hatch*, 9 Ves. Jr. 292, and *Bridgeman v. Greene*, 2 Ves. Sr. 627, in which there was much evidence that the person was perfectly aware of what he was doing, and repeatedly confirmed it. Upon that Lord Chief Justice Wilmot's observation is 'that it only tends to show more clearly the deep-rooted influence obtained over him.' Lord Eldon, after referring to those cases with approbation, applying the principle to the case before him, in which the grantor was a widow in the prime of life, said: 'The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and prudence was placed around her as against those who advised her, which from their situation and relation with respect to her they were bound to exert in her behalf.' In the case of *Dent v. Bennett*, Lord Cottenham quoted Sir Samuel Romilly's language, uttered thirty years before, and incorporated it in his opinion as an established principle of equity. 4 My. & Cr.



§ 160. Abuses of personal influence for the undue enrichment of the party exercising it, have been regarded by equity judges as breaches of trust, falling peculiarly within the province of equitable correction. Transactions which in courts applying the strict common law would evade scrutiny, will, if tainted by undue influence, be overhauled in equity, and will be set aside if it appear that this influence was used to extort from a dependant an unjust bargain.<sup>1</sup> In such cases, where undue influence, based "on the circumstances and conditions of the parties," is exercised, and a bargain thus elicited, "the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption from contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable."<sup>2</sup>

Courts of equity take peculiar cognizance of such breaches of trust.

§ 161. Relief of this kind is given whenever positions of authority or trust have been used to obtain unrighteous advantages; and under this head may be classed undue influence unconscientiously and prejudicially exercised by parent over child;<sup>3</sup> by

Rule applies whenever there are authoritative or fiduciary relations.

277. The same doctrine has been frequently announced in American courts. *Taylor v. Taylor*, 8 How. 183. In *Sears v. Schafer*, 2 Seld. 268, it is said: 'In some cases undue influence will be inferred from the nature of the transaction alone; and in all cases a court of equity interposes its benign jurisdiction to set aside instruments executed between parties, in which one party is so situated as to exercise a controlling influence over the will, conduct, and interests of another.' *Harvey v. Sullens*, 46 Mo. 147, is the case of a will. There the court say: 'Where a person is so sick, worn out, and enfeebled that he is a mere passive instrument in the hands of those who produce the will, it is evident such will ought not to be permitted to stand.' We have a number of Maryland decisions of the same general tenor, viz. . *Brogden v. Walker*, 2 H.

& J. 285; *Carberry v. Tannehill*, 1 Ib. 224; *Highberger v. Stiffler*, 21 Md. 352; *Todd v. Grove*, 33 Ib. 194; and *Eakle v. Reynolds*, decided April Term, 1880; as also *Stumpf v. Stumpf*, of October Term, 1879, unreported. We are convinced from the proof that the mind of the grantor was greatly impaired, and that its perverted action was fraudulently taken advantage of by means of the deed in question."

<sup>1</sup> Story's Eq. 12th ed. § 238 *et seq.*; Bisp. Eq. §§ 230 *et seq.*; *Aylesford v. Morris*, L. R. 8 Ch. 490; *O'Rorke v. Bolingbroke*, L. R. 2 Ap. Ca. 814.

<sup>2</sup> Lord Selborne, Ch., in *Aylesford v. Morris*, L. R. 8 Ch. 490, adopted in *Anson on Contracts*, 157.

<sup>3</sup> *Hoghton v. Hoghton*, 15 Beav. 278; *Baker v. Bradley*, 7 De G. M. & G. 597; *Wright v. Vanderplank*, 8 De G. M. & G. 137; *Bainbrigge v. Brown*, 44 L. T. (N. S.) 705; *Taylor v. Taylor*,

an uncle standing *in loco parentis* over a niece;<sup>1</sup> by any member of a family who has acquired an overweening influence over another;<sup>2</sup> by a solicitor or counsel over client;<sup>3</sup> by a

8 How. U. S. 183; though see *supra*, § 157; *Bergen v. Udell*, 31 Barb. 9; *Berkmeyer v. Kellerman*, 32 Oh. St. 239. As to ratification see remarks of *Turner, L. J.*, in *Rhodes v. Bate*, cited *infra*, § 168.

<sup>1</sup> *Archer v. Hudson*, 7 Beav. 560; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Graham v. Little*, 3 Jones' Eq. 152.

<sup>2</sup> *Harvey v. Mount*, 8 Beav. 439; *Todd v. Grove*, 33 Md. 188; *Martin v. Martin*, 1 Heisk. 644. Lord Chelmsford's ruling, in *Tate v. Williamson*, L. R. 2 Ch. 61, following that of *Wood, V. C.* (afterwards Lord Hatherly), S. C. L. R. 1 Eq. 528, illustrates the distinction in the text. The complainant in that case, when a young man of twenty-two, was largely indebted, though holding the half of a freehold estate. He wrote to his great-uncle, who sent a nephew, *Williamson*, to confer with the complainant. *Williamson* caused a valuation to be made by a surveyor, according to which the mines under the whole tract were worth £20,000. Without communicating this to the complainant, he purchased the complainant's interest for £7000. The sale was set aside by *Wood, V. C.*, and this was affirmed by Lord Chelmsford, on the ground that there was a relation of confidence in the case which required a disclosure of all the facts. As to the duty of disclosure under such circumstances, see *infra*, §§ 254-256 *a*.

<sup>3</sup> *Infra*, § 426; *Bispham's Eq.* § 236; *Wh. on Agency*, § 574; *Tyrell v. Bank of London*, 10 H. L. Cas. 26; *Holman v. Loynes*, 4 De G. M. & G. 270; *Greenfield's Est.*, 14 Penn. St. 489; S. C. 24 Penn. St. 232, and cases cited *infra*, §

426. The utmost good faith must be shown to sustain a sale of property in litigation by client to counsel. *Walmesley v. Booth*, 2 Atk. 25; *Savery v. King*, 5 H. L. C. 627; *Whitehead v. Kennedy*, 69 N. Y. 462; *Merritt v. Lambert*, 10 Paige, 352; *Smith v. Brotherline*, 62 Penn. St. 461. That business transactions between client and counsel will be jealously watched, and that counsel cannot purchase client's property without client's full and free consent, see *infra*, § 426. *Dunn v. Record*, 63 Me. 17; *Lewis v. Hilman*, 3 H. of L. C. 607; *Mott v. Harrington*, 12 Vt. 199; *Mills v. Mills*, 26 Conn. 213; *St. Leger's App.*, 34 Conn. 450; *Hawley v. Cramer*, 4 Cow. 717; *Berrien v. McLane*, 1 Hoff. N. Y. 421; *Barry v. Whitney*, 3 Sandf. 696; *Ford v. Harrington*, 16 N. Y. 285; *Boyd v. Boyd*, 66 Penn. St. 283; *Roman v. Mali*, 42 Md. 513; *Jennings v. McConnell*, 17 Ill. 148; *Zeigler v. Hughes*, 55 Ill. 288; *Gray v. Emmons*, 7 Mich. 533; *Riddell v. Johnson*, 26 Grat. 152; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241.

"It is the duty of the attorney to protect the interests of his clients, and the client is entitled, while the relation exists, to the full benefit of the best exertions of his attorney; therefore, an attorney may not bring his own personal interest in any way into conflict with that which his duty requires him to do, or make a gain for himself in any manner whatever, at the expense of his client in respect to the subject of any transactions connected with or arising out of the relation of attorney and client, beyond the amount of a just and fair professional remuneration."

director or promoter of a company over the company;<sup>1</sup> by a partner over a partner, all clandestine dealings by one partner to his exclusive benefit being forbidden;<sup>2</sup> by a trustee over *cestui que trust*;<sup>3</sup> by any person using influence over another to whom he occupies confidential relations;<sup>4</sup> by an executor or administrator over the parties whose interests it is his duty

ation, to which he is entitled. Kerr on Frauds, page 163. Yet the law does not go so far as to prohibit an attorney from purchasing from his client. That is, he is not incapacitated by virtue of his relation as an attorney to purchase. If, however, he purchases a client's property during the continuance of the relation of attorneyship, which is the subject-matter of such relationship, the burden of proof lies on him to show that the transaction has been perfectly fair, and he must be able to show that a just and adequate price has been given." Horton, C. J., Yeaman v. James, Sup. Ct. Kan. 1882.

In Holmes' Est., 3 Giff. Ch. Rep. 345, Sir John Stuart, V. C., said: "The law of this court as to gifts by a client to his solicitor, I think, is perfectly established. The principle is, that the relation of solicitor and client is one of such high confidence on the part of the client that the solicitor is considered to have an amount of influence over the mind and action of his client, which, in the eye of this court, while that influence remains, makes it almost impossible that the gift can prevail. The principle of influence vitiates the gift; but the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client. That relation is only looked at as creating the influence; and, as soon as circumstances of evidence are introduced which remove all effect of the

influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the object of his client's bounty, and to be the recipient from his client of a gift which will be valid at law and in equity." That assignments by a client to his counsel of interests in litigation are void, see *infra*, § 426.

<sup>1</sup> Imperial Merc. Co. v. Coleman, L. R. 6 H. L. 189; Flanagan v. R. R., L. R. 7 Eq. 116; New Sombrero Phosphate Co. v. Erlanger, L. R. 5 C. D. 73. *Infra*, § 255 a.

<sup>2</sup> Story, Partnership, § 172; Russell v. Austwick, 1 Sim. 52; Getty v. Devlin, 54 N. Y. 403; Hopkins v. Watt, 13 Ill. 298; King v. Wise, 43 Cal. 629.

<sup>3</sup> Coles v. Trecothick, 9 Ves. 234; Hunt v. Moore, 2 Barr. 105; Diller v. Brubaker, 52 Penn. St. 498; Parchell's App., 65 Penn. St. 224; Ellis v. Barker, L. R. 7 Ch. 104; Thomson v. Eastwood, L. R. 2 Ap. Ca. 236; Parker v. Nickerson, 112 Mass. 195; Spencer's App., 80 Penn. St. 332. *Infra*, § 378. Thus one trustee cannot purchase the *cestui que trust's* property at a sale by the other trustee. Davoue v. Fanning, 2 Johns. Ch. 261; Gaines v. Allen, 58 Mo. 541; Miles v. Wheeler, 43 Ill. 124; *infra*, § 378. As to the duty of a person occupying a fiduciary position to disclose facts, see *infra*, § 254.

<sup>4</sup> Lewin on Trustees, 337; Hobday v. Peters, 8 Beav. 354; McClure v. Lewis, 72 Mo. 314.

to protect;<sup>1</sup> by a guardian over a ward;<sup>2</sup> by a child over a dependent parent;<sup>3</sup> by an agent, occupying a fiduciary relation, over a principal;<sup>4</sup> by a husband over a wife;<sup>5</sup> by a medical

<sup>1</sup> *Michoud v. Girod*, 4 How. 503; *Casey v. Casey*, 14 Ill. 112; *Read v. Howe*, 39 Iowa, 553; *Statham v. Ferguson*, 25 Grat. 28; *Scott v. Umbarger*, 41 Cal. 410; *Osborne v. Graham*, 30 Ark. 66.

<sup>2</sup> *Dawson v. Massey*, 1 B. & B. 226; *Gallatien v. Cunningham*, 8 Cow. 361; *Eberts v. Eberts*, 55 Penn. St. 119; *Hunter v. Lawrence*, 11 Grat. 111; *Blackmore v. Shelby*, 8 Humph. 439; *Womack v. Austin*, 1 S. C. 421; *Malone v. Kelly*, 54 Ala. 532; *Garvin v. Williams*, 50 Mo. 206; *Meek v. Perry*, 36 Miss. 190. "Settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are viewed by the courts with a watchful and even jealous eye. To sustain such settlements it must appear that the ward had sufficient time and opportunity to examine the guardian's accounts; and that he was either himself competent to make the examination, or was assisted by competent and independent advice." *Bispham's Eq.* § 234, citing *Hylton v. Hylton*, 2 Ves. Sr. 547; *Somes v. Skinner*, 16 Mass. 348; *Kirby v. Taylor*, 6 Johns. Ch. 248; *Elliott v. Elliott*, 5 Binn. 8; *Say v. Barnes*, 4 S. & R. 112; *Stanley's App.*, 8 Penn. St. 431; *Cowan's App.*, 74 Penn. St. 329; *Andrews v. Jones*, 10 Ala. 400; *Meek v. Perry*, 36 Miss. 190; and see *Hoppin v. Tobey*, 9 R. I. 42; *Greenawalt ex parte*, 2 Clark, 1.

<sup>3</sup> *Whelan v. Whelan*, 3 Cow. 537; *Highberger v. Stiffler*, 21 Md. 338; *Simpler v. Lord*, 28 Ga. 52. On the other hand, if "the information which the trustee has is in no way superior to that of the *cestui que trust*; if the latter is fully informed of all the facts of the case, and their probable bearing

on the value of the property; and if he is acting on independent advice, and his mind is entirely free from any control of the trustees, and the transaction be in itself a reasonable one, it may, under these circumstances, be upheld." *Bispham's Eq.* § 237; citing *Perry on Trusts*, § 195. See *Redgrave v. Hurd*, L. R. 20 Ch. D. 1.

<sup>4</sup> *Infra*, § 378; *Wh. on Agency*, §§ 231, 523; *Lowther v. Lowther*, 13 Ves. 103; *Reed v. Norris*, 2 Myl. & Cr. 361; *Dunne v. English*, L. R. 18 Eq. 524; *Kimber v. Barker*, L. R. 8 Ch. Ap. 56; *Morgan v. Minett*, L. R. 6 C. D. 638; *Provost v. Gratz*, 6 Wheat. 481; *Jackson v. Ludeling*, 21 Wall. 617; *Smith v. Townsend*, 109 Mass. 500; *Claffin v. Bank*, 25 N. Y. 293; *Bain v. Brown*, 56 N. Y. 285; *Chorpenning's App.*, 32 Penn. St. 315; *Gaines v. Allen*, 58 Mo. 541.

<sup>5</sup> The statutes in most of our states requiring that to make a wife's release of dower valid she should be examined separately from her husband, illustrate the jealousy with which the wife's independence in this respect is guarded. When the wife agrees to convey her separate estate, she having power to do so, to her husband, and he afterwards asks the aid of the law to enforce the bargain, the burden is on him to prove the fairness of the transaction. See *Boyd v. De la Montagnie*, 73 N. Y. 498. That a husband's threats to commit suicide will not avoid his wife's deed thus induced, see *Wright v. Remington*, 41 N. J. L. 48; *supra*, § 148. Mr. Pollock refers to *Cobbett v. Brock*, 20 Beav. 524; *Page v. Horne*, 11 Beav. 227, as showing that there is a fiduciary relation in persons engaged to be married; but that this does not extend to cases of illicit intercourse. Far-

man over a patient;<sup>1</sup> by a priest or other religious guide over

mer v. Farmer, 1 H. L. C. 724. That an ante-nuptial contract executed by an intended wife without full disclosure of her husband's circumstances, will not be enforced against her, see *Kline v. Kline*, 57 Penn. St. 120; *Kline's Est.*, 64 Penn. St. 122; *infra*, § 399. That agreements of husband and wife providing for separation, are void, see *infra*, § 395. As to disabilities of married women, see *supra*, §§ 76 *et seq.* That agreements between husband and wife are at common law void, see *supra*, § 91.

<sup>1</sup> *Dent v. Bennett*, 4 My. & Cr. 269; *Billage v. Southee*, 9 Hare, 534; *Ahearne v. Hogan*, Dru. 310; *Greenfield's Est.*, 14 Penn. St. 489; *Crispell v. Dubois*, 4 Barb. 393; *Cadwallader v. West*, 40 Mo. 483; though see *Blackie v. Clarke*, 15 Beav. 595, *Pratt v. Barker*, 1 Sim. 1, 4 Russ. 507, as showing that such gifts freely and intelligently made will be sustained.

"A medical attendant who makes with his patient a contract in any way depending on the length of the patient's life is bound not to keep to himself any knowledge he may have professionally acquired, whether by forming his own opinion, or by consulting with other practitioners, as to the probable duration of the life." *Pollock*, 532, citing *Popham v. Brooke*, 5 Russ. 8. But mere professional relationship of this class does not invalidate a contract otherwise fair. *Doggett v. Lane*, 12 Mo. 215.

And in a case before the Court of Appeal in 1881 (*Selborne*, L. C., *Bramwell* and *Baggally*, L. J., affirming a judgment of *Stephen*, J.), where it appeared that after a gift by a lady to her medical adviser, not made under undue influence, three years elapsed between the donor's death and the

close of the relation of patient and medical man between the parties, and where after that relationship had come to an end, and any effect produced by it had been removed, she intentionally abode by what she had done, it was held that the gift was not void but voidable; and as she must be taken upon the facts to have known that it was voidable and not to have avoided it, the defendant was entitled to judgment. *Mitchell v. Hornfrey*, 45 L. T. N. S. 694, L. R. 8 Q. B. D. 587. As to ratification, see *infra*, § 168. "Repeated decisions," said *Baggally*, L. J., "have settled that the relation of a medical man towards his patient is confidential. Therefore the gift in this case being from a patient to her medical man, and without any independent advice, was originally either void or voidable. But then the jury have found that the relation of medical man and patient ceased when *Jane Geldard* went to *Barnard Castle* in 1872, and that after that relation had ceased, and any effect produced by it had ceased, she intentionally abode by what she had done. That gets rid of a second principle laid down in *Rhodes v. Bate* (L. R. 1 Ch. Ap. 257), that, where a confidential relation has once existed, the court will presume its continuance unless some positive act or some complete case of abandonment is shown. Here the jury find that the confidential relation had ceased for more than three years before *Mrs. Geldard's* death. Then they find that she, during that period, 'intentionally abode by what she had done.' Now no doubt we have to take that finding with the admission that *Mrs. Geldard* had no independent advice at any time. But the finding of the jury contains the word 'intention-

a parishioner or penitent applying to him for counsel;<sup>1</sup> and, generally, by a person of authority, applied to for advice, over the person to whom the advice is given.<sup>2</sup> And, as a general rule, a person occupying a position of trust and confidence will not be permitted to use that position to make money out of those whom it is his duty to protect.<sup>3</sup> "I take it to be a well-

ally.' That must be taken to mean that she knew what she had done, that she approved of what she had done, and that she determined to abide by it. It was an adoption of what she had done, after the confidential relation had ceased for three years, sufficient to take it out of the cases where gifts have been invalidated on the ground of confidential relationship coupled with absence of independent advice."

<sup>1</sup> *Hugenin v. Bazely*, 14 Ves. 273; but see *Greenfield's Est.*, 24 Penn. St. 232; *Welsh in re*, 1 Redf. 238. In *Lyon v. Home*, L. R. 6 Eq. 655, a gift of £24,000 by a woman of seventy-five years to a spiritualistic director was set aside. As to religious advisers, see further; *Hugenin v. Bazely*, 14 Ves. 273; 2 Lead. Cas. Eq. 556; *Turner v. Collins*, L. R. 7 Ch. 329; *Hoghton v. Hoghton*, 15 Beav. 278; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Taylor v. Taylor*, 8 How. U. S. 183; *Slocum v. Marshall*, 2 Wash. C. C. 397; *St. Leger's App.*, 34 Conn. 434; *Stewart v. Hubbard*, 3 Jones Eq. 186; *Graham v. Little*, 3 Jones Eq. 152; *Davis v. McNalley*, 5 Sneed, 583. *Nottidge v. Prince*, 2 Giff. 246, was the case of a woman who held that a deposed English clergyman, who had set up an institution called Agapemone, or Free Love, was an incarnation of divinity. Under this belief (she being sane in other respects) she conveyed large amounts of property to him, she living at the time at the Agapemone where she died. It was decreed that the

defendant had obtained the property by undue influences, and he was ordered to convey the property to her heirs, notwithstanding he declared in his answer that the conveyance was made without his knowledge or solicitation.

<sup>2</sup> "It is not," said Lord Kingsdown, in *Smith v. Kay*, 7 H. L. C. 750, as adopted in *Anson on Contracts*, 160, "the relation of solicitor and client, or trustee and *cestui que trust*, which constitutes the sole title to relief in these cases. . . . *The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed.*"

See also *Brown v. Kennedy*, 33 Beav. 133; *Tate v. Williamson*, L. R. 2 Ch. 61; *Turner v. Collins*, L. R. 7 Ch. 329; *Moxon v. Payne*, L. R. 8 Ch. 881; *Beynon v. Cook*, L. R. 10 Ch. 389; *Everitt v. Everitt*, L. R. 10 Eq. 405; *Smith v. Kay*, 7 H. L. C. 750; *Selden v. Myers*, 20 How. U. S. 506; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Wistar's App.*, 54 Penn. St. 63; *Persch v. Quiggle*, 57 Penn. St. 247; *Hetrick's App.*, 58 Penn. St. 477; *Spencer's App.*, 80 Penn. St. 317; *Todd v. Grove*, 33 Md. 188; *McCormick v. Malin*, 5 Blackf. 509; *Rockafellow v. Newcomb*, 57 Ill. 185; *Bayliss v. Williams*, 6 Cold. 440; *Deaton v. Munroe*, 4 Jones Eq. 39; *Turner v. Turner*, 44 Mo. 535. As to the duty of full disclosure under such circumstances, see *infra*, §§ 254 *et seq.*

<sup>3</sup> *Infra*, § 378; *Tyrrell v. Bank of London*, 10 H. L. C. 26; *Poillon v.*

established principle of this court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle."<sup>1</sup> But the term "undue influence" is not to be applied to cases where a party under the influence of well-considered purposes makes settlements on relatives or friends to whom he is bound by peculiar duty or affection.<sup>2</sup>

§ 162. It is not to be supposed that long habits of submission will cease simultaneously with the technical cessation of the legal relation on which these habits were originally based. A ward, for instance, on reaching his majority, cannot, in most cases, throw off his sense of subordination to his guardian; nor is a father's influence over a child likely to cease with the child's nominal emancipation. A trustee, also, upon throwing up his trust, may retain his influence. When once a fiduciary or advisory relation has existed, it will be so far presumed to continue, that, when a bargain is made peculiarly advantageous to the party in whom the confidence is reposed, the burden is on him to show that the transaction was fair.<sup>3</sup> But when the

Influence when established presumed to continue

Martin, 1 Sandf. Ch. 569; see *Tate v. Williamson*, L. R. 1 Eq. 528, 2 Ch. 55; *Baker v. Loader*, L. R. 16 Eq. 49.

<sup>1</sup> *Turner, L. J., Rhodes v. Bate*, L. R. 1 Ch. Ap. 257.

<sup>2</sup> *Supra*, § 159; *Eakle v. Reynolds*, 54 Md. 305; *Wise v. Swartzwelder*, 54 Md. 292.

In *Taylor v. Johnston*, 46 L. T. N. S. 219, where it appeared that an orphan girl, nearly of age, was living with a married female cousin, to whom on her death-bed she made an absolute

gift of moneys drawn out from a banking account kept by the girl in her own name, it being proved that she was a person of strong will and independent character; that others of her relatives had free access to her; and that she had had the advice of an old friend of her father's with regard to pecuniary matters; it was held that no such fiduciary relationship existed as would invalidate the gift.

<sup>3</sup> *Pollock*, 3d ed. 570; *Dent v. Bennett*, 4 My. & Cr. 277; *Smith v. Kay*,

influence has ceased to operate, an intelligent ratification binds.<sup>1</sup>

§ 163. The presumption of continuance, however, applicable to this as well as to all other relationships,<sup>2</sup> is not to be stretched so as to involve a presumption of unfairness in all dealings between a person imposing and a person accepting confidence. There is no such presumption recognized in law; and, as a matter of fact, by far the greater part of the dealings between persons imposing and persons accepting confidence are fair. Among persons who have been for a time intimately connected there is no business done without confidence imposed and accepted; and, as a rule, the longer and tenderer the confidence, the more scrupulous the fairness of the dealings of the party in whom the confidence is reposed. All that the law says is, that, when a party in accepting confidence obtains an unequal advantage from the other party, the burden is on him to show that the bargain was made by the other intelligently and without undue pressure.<sup>3</sup> In other words, if suit be brought on such a contract, the party suing must prove that the contract was made freely and intelligently.<sup>4</sup> "If a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence."<sup>5</sup>

7 H. L. C. 750; and see *Archer v. Hudson*, 7 Beav. 551; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Grosvenor v. Sheratt*, 28 Beav. 659.

<sup>1</sup> *Infra*, § 168.

<sup>2</sup> See Wh. on Ev. § 1285.

<sup>3</sup> *Gibson v. Jayes*, 6 Ves. 266.

<sup>4</sup> "Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith

of the transaction is on the party who is in a position of active confidence." Indian Evidence Act, cited *Pollock*, 525; *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218. As to ratification, see *infra*, § 168.

<sup>5</sup> Lord Penzance in *Parfitt v. Lawless*, L. R. 2 P. & D. 468.

"The court," as was said by James, L. J., in *Kempson v. Ashbee* (30 L. T. Rep. N. S. 749; L. R. 10 Ch. 15), "has endeavored to prevent persons



§ 164. It has been held in England on high authority that, where a donation is claimed by a person holding a fiduciary or authoritative relation to another to have been made to him by the person thus under his influence, the burden is on the party setting up the donation to prove its fairness. Such a transaction may be fair, and suitable to the circumstances of the parties. But this, it is held, must be shown by the party by whom it is accepted.<sup>1</sup>

When a voluntary donation is set up, burden on party setting it up to prove it to be fair.

subject to influence from being induced to enter into transactions without independent advice." *S. P. Rhodes v. Bate*, L. R. 1 Ch. 252.

In *Bainbrigge v. Brown*, 44 L. T. N. S. 705, the three children of Dr. Bainbrigge, they being aged respectively twenty-five, twenty-four, and twenty-two, and resident under their father's roof, and not emancipated from his control, executed a deed by which they made themselves liable for the interest on certain mortgage debts of their father to his mortgagees, and charged their reversionary interests under their parents' marriage settlement for that purpose, and gave the mortgagees a power of sale over such reversionary interests. In consideration of receiving the interest payable under the deed, the mortgagees agreed to reduce the rate of interest payable on their mortgages. The children brought an action to set aside the deed as against their father and his mortgagees, on the ground of undue influence exercised by their father. It was held by Fry, L. J. (May, 1881), that, as against the father, the burden of proof lay on him, and that, as he had not discharged it, the deed must be set aside as against him; but that, as against the mortgagees, the burden of proof lay on the plaintiffs, that they had not discharged it, and that the

deed could therefore not be set aside as against the mortgagees.

<sup>1</sup> Lord Romilly in *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, 15 Beav. 278; *S. P. Lord Hatherley in Phillips v. Mullings*, L. R. 7 Ch. 246; *Colburn v. Van Velzer*, 11 Fed. Rep. 795.

Mr. Pollock, however (Cont. 3d ed. 574), objects to such broad statements of the law, saying that he "has reason to know that they cannot be relied on in practice," and that, "carried to their full extent, they would make an irrevocable gift almost impossible." But the question, so far as concerns the burden of proof, depends upon the way in which the issue is presented. If the donee claims specific performance of such a gift, the burden is on him to prove its fairness. But if the donor seeks to rescind, or to recover back the thing given, he ought to prove something more than a prior fiduciary relation between himself and the donee. The fact that the gift has been carried into execution argues a deliberation and coolness which he ought to rebut by showing that he was at the time not fully advised of his act, and that the act was performed under undue influence.—That, as a matter of law, an executed gift without consideration will be sustained, when not in fraud of other parties, will be hereafter seen. *Infra*, § 496.

§ 165. Inadequacy of price is in itself no ground for setting aside a contract. A vendor may conscientiously depreciate his own property, and to say that he shall not sell at the price he himself fixes is to say he shall not sell at all.—He may be desirous, also, of benefiting a friend or relative by giving him a property at a low price, the object being not to create a feeling of absolute dependence, but to aid, and at the same time to require exertion of some kind in return; and when such an intention is shown, the conveyance is one which, so far as this question is concerned, should not be set aside. Value, also, is uncertain in its limits; and unless there be gross inadequacy, courts are unwilling to make it a condition of the validity of a conveyance.<sup>1</sup> “The value of a thing,” says Judge Story, “is what it will produce; and it admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief.”<sup>2</sup> But when there is such gross inadequacy as to lead to the inference that one party either acted in ignorance of what he was doing, or was unduly influenced by

<sup>1</sup> *Infra*, §§ 239, 518; Story, Eq. Jur. 29; Davidson v. Carter, 55 Iowa, 117; 12th ed. §§ 38 a, 245; Peacock v. Robinson v. Schley, 6 Ga. 515. Evans, 16 Ves. 512; Borell v. Dann, <sup>2</sup> Story, Eq. Jur. 12th ed. § 245, citing Griffith v. Spratley, 1 Cox, 383; 2 Hare, 440; Harrison v. Guest, 6 D. Harrison v. Guest, 8 H. L. C. 481; Williams, L. R. 20 Eq. 210; Eyre v. Warner v. Daniels, 1 Wood. & M. 110; Potter, 15 How. U. S. 42; Follett v. Hamet v. Dundass, 4 Barr, 178. That Rose, 3 McL. 332; Hutmacher v. Harris, 38 Penn. St. 491; Baker v. Roberts, 14 Ind. 552; Schnell v. Nell, 17 Ind. the sufficiency of consideration will not ordinarily be determined by the courts, see *infra*, § 517.

the other party, then a court of equity will interfere.<sup>1</sup> There must, however, be "such unconscionableness or inadequacy" "made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And when there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."<sup>2</sup> And when there was any mental weakness on the part of the party conveying and he was not independently advised, the conveyance, as against him or his personal representatives, will not be permitted to stand.<sup>3</sup> A strong element in the proof of imposition in such cases is the needy circumstances of the vendor, exposing him peculiarly to the wary rapacity of a particular party to whom he may apply for aid.<sup>4</sup> But only the party injured or his representatives, so it has been held, can take advantage of inadequacy of price.<sup>5</sup>

§ 166. The cases we have been considering are those in which the party seeking the aid of the court asks to have an unconscientious bargain rescinded. In such cases, as this unconscientiousness is the chief ingredient in his case, the burden is on him to prove it. Another issue is presented when the agreement has not been executed, and when the vendee applies for its specific performance. In such case the court will refuse its aid to enforce a hard bargain, unless it should appear that the defendant entered into it intelligently and freely. In the former

In such cases specific performance will be refused.

<sup>1</sup> *Infra*, § 518; *Rice v. Gordon*, 11 Beav. 265; *Cockell v. Taylor*, 15 Beav. 103; *Tennent v. Tennent*, L. R. 2 Sc. & D. 6; *Parmelee v. Cameron*, 41 N. Y. 392; *Clark v. Depew*, 25 Penn. St. 509.

<sup>2</sup> Story, Eq. 12th ed. § 245, citing *Coles v. Trecothick*, 9 Ves. 246; *Underhill v. Horwood*, 10 Ves. 219; *Peacock v. Evans*, 16 Ves. 512; *Howard v. Edgell*, 17 Vt. 9; *Osgood v. Franklin*, 2 Johns. Ch. 1, 23; 14 Johns. 527; *Mayo v. Carrington*, 19 Grat. 74; *Weld v. Rees*, 48 Ill. 428; *Butler v. Haskell*, 4 Des. S. C. 651; *Mitchell v. Jones*, 50 Mo. 438; see *infra*, §§ 516 *et seq.*

<sup>3</sup> *Supra*, §§ 159 *et seq.*; *Cockell v. Taylor*, 15 Beav. 103; *Boyse v. Rossborough*, 6 H. L. C. 2; *Harding v. Handy*, 11 Wheat. 113; *Allore v. Jewell*, 94 U. S. 511; *Brady's App.*, 66 Penn. St. 277; *Hough v. Hunt*, 2 Ohio, 495; *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241; *Lester v. Mahon*, 25 Ala. 445.

<sup>4</sup> *Wood v. Abrey*, 3 Mad. 423.

<sup>5</sup> *Davidson v. Little*, 22 Penn. St. 245.

case, the doctrine that a court of equity will not intervene unless in a case clearly made out, tells against the party seeking to rescind; in the latter case the same doctrine tells against the party seeking to enforce. Hence, in the latter case specific performance will be refused in a case where the price is grossly inadequate, as a court of equity will not permit itself to be the active agent in enforcing a wrong.<sup>1</sup> But bare inadequacy of price, without such gross disproportionateness as "to shock the conscience," will not be ground to refuse the aid of the court.<sup>2</sup> It is otherwise, however, when the price is preposterously inadequate.<sup>3</sup> A price amounting to only one-fourth of the value has been held inadequate in this sense;<sup>4</sup> and so has a price amounting to one-half of the value.<sup>5</sup>

§ 167. Not merely the party imposed on himself, but his representatives, can contest an engagement which he has been induced to make improvidently by the undue influence of others.<sup>6</sup> And the property thus

Party's representatives may contest.

<sup>1</sup> *Bispham's Eq.* §§ 371-4; *Falcke v. Gray*, 4 Drew, 651; *Day v. Newman*, 2 Cox, 77; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Summers v. Griffiths*, 35 Beav. 27; *Byers v. Surget*, 19 How. U. S. 313; *Eastman v. Plumer*, 46 N. H. 464; *Hamet v. Dundass*, 4 Barr, 178; *Graham v. Pancoast*, 30 Penn. St. 89; *Nace v. Boyer*, 30 Penn. St. 99; *Madison Co. v. People*, 58 Ill. 456; *Gasque v. Small*, 2 Str. Eq. 72; *Morris v. Philliber*, 30 Mo. 145; *Mitchell v. Jones*, 50 Mo. 439. For an analysis of the conflicting English cases, see *Pollock*, *Wald's ed.* 543.

<sup>2</sup> *Bispham's Eq.* § 219; *Harrison v. Guest*, 6 De G. M. & G. 424; 8 H. L. C. 481; *Cathcart v. Robinson*, 5 Pet. 264; *Erwin v. Parham*, 12 How. U. S. 197; *Bedel v. Loomis*, 11 N. H. 9; *Park v. Johnson*, 4 Allen, 259; *Powers v. Mayo*, 97 Mass. 180; *Lee v. Kirby*, 104 Mass. 420; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Seymour v. Delancy*, 3 Cow. 445; *Weber v. Weitling*, 3 C. E. Green, 441; *Cummings' App.*, 67 Penn.

St. 404; *Cribbins v. Markwood*, 13 Grat. 495; *White v. McGannon*, 29 Grat. 511; *Steele v. Worthington*, 2 Ohio, 182; *White v. Thompson*, 1 Dev. & B. 493; *Sarter v. Gordon*, 2 Hill Ch. 121.

<sup>3</sup> *Bispham's Eq.* § 371; *Callaghan v. Callaghan*, 8 Cl. & F. 374; *Howard v. Edgell*, 17 Vt. 9; *Osgood v. Franklin*, 2 Johns. Ch. 23; 14 Johns. 527; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Shepherd v. Bevin*, 9 Gill, 32; *Holland v. Hensley*, 4 Iowa, 222; *Harrison v. Town*, 17 Mo. 237.

<sup>4</sup> *Robinson v. Robinson*, 4 Md. Ch. 182.

<sup>5</sup> *Seymour v. Delancy*, 6 Johns. Ch. 222; see S. C. 3 Cow. 445.

<sup>6</sup> *Supra*, § 146; *Hunter v. Atkins*, 3 M. & K. 113; *Countts v. Acworth*, L. R. 8 Eq. 588; *Ford v. Olden*, L. R. 3 Eq. 461; *Holman v. Loynes*, 4 D. M. G. 270; *Allore v. Jewell*, 94 U. S. 506; *Ford v. Harrington*, 16 N. Y. 185; *Yard v. Yard*, 27 N. J. Eq. 114; *Hawkins' App.*, 32 Penn. St. 263; *Tracey*

obtained may be pursued in the hands of all assignees with notice.<sup>1</sup> The transaction, however, cannot be contested by third parties,<sup>2</sup> nor can it be attacked by the party implicated in the wrong.<sup>3</sup>

§ 168. Contracts of this class, like contracts under duress,<sup>4</sup> can be ratified by the party imposed upon, after the disturbing influence has been removed; and this may be either by continuance in possession of the fruits of the contract,<sup>5</sup> or by express approval and confirmation.<sup>6</sup> But to work such ratification it must appear that the mind of the party imposed on was not only relieved from the undue influence under which he was placed, but was enlightened as to his true position and the nature of the particular transaction.<sup>7</sup>

Such contracts may be ratified.

*v. Sacket*, 1 Oh. St. 54; *Rumph v. Abercrombie*, 12 Ala. 64; *Cadwalader v. West*, 48 Mo. 483.

<sup>1</sup> *Huguenin v. Baseley*, 14 Ves. 273; *Whelan v. Whelan*, 3 Cow. 537; *infra*, § 292.

<sup>2</sup> *Metcalfe's Trusts*, 2 De G. J. & S. 122; *Davidson v. Little*, 22 Penn. St. 245; *Andrews v. Jones*, 10 Ala. 419; cited *Wald's Pollock*, 562.

<sup>3</sup> *Infra*, § 235.

<sup>4</sup> See *supra*, § 154.

<sup>5</sup> *Wright v. Vanderplank*, 8 D. M. G. 133; *Turner v. Collins*, L. R. 7 Ch. 329; *Youst v. Martin*, 3 S. & R. 423; *Hassler v. Bitting*, 40 Penn. St. 68. As to proof in such cases see §§ 58 *et seq.*, 154.

<sup>6</sup> *Stump v. Gaby*, 2 D. M. G. 623; *Morse v. Royal*, 12 Ves. 355.

<sup>7</sup> *Supra*, § 154; *Moxon v. Payne*, L. R. 8 Ch. 881; *Kempson v. Ashbee*, L. R. 10 Ch. 15; *Montgomery v. Pickering*, 116 Mass. 227; *Price's App.*, 54 Penn. St. 472; *Thompson v. Lee*, 31 Ala. 292. That knowledge of law is not necessary, see *supra*, § 57. In *Mitchell v. Homfrey*, 45 L. T. N. S. 694, cited *supra*, § 161, we have the following from Lord Selborne: "The case of Rhodes

*v. Bate* (L. Rep. 1 Ch. App. 252), though it goes further than any other, laying down that wherever there is a confidential relationship the beneficiary must show not only that there was no impropriety in the gift, but that the donor had independent advice, does not go on to say that that is necessary if there is a deliberate intention to abide by the transaction after the influence has ceased and any effect produced by the relationship has been entirely removed. There is not much authority to assist us in arriving at our decision, which is in favor of not disturbing this judgment; but there is some. The case of *Dent v. Bennett* (4 Myl. & C. 269) was a case where the gift was set aside; but I find this passage in the judgment of the Lord Chancellor (Cottenham) at p. 275: 'There is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence.' That does not go far to show what the effect of such evidence would be; but at least it shows that it would have been a very material element in arriving at

§ 169. If we place together an expectant heir, in needy circumstances, ready to seize money on any terms, no matter

a decision in that case. In the case of *Wright v. Vanderplank* (8 De G. M. & G. 133) Turner, L. J., who delivered the judgment in *Rhodes v. Bate* (L. Rep. 1 Ch. App. 252), says, at p. 146: 'A child is presumed to be under the exercise of parental influence as long as the dominion of the parent lasts. Whilst that dominion lasts, it lies on the parent maintaining the gift to disprove the exercise of parental influence, by showing that the child had independent advice, or in some other way.' I do not lay much stress on that; but I know of no reason for supposing that the law on this point as between doctor and patient differs from that as between parent and child. The lord justice continues: 'When the parental influence is disproved, or that influence has ceased, a gift from a child stands on the same footing as any other gift; and the question to be determined is, whether there was a deliberate unbiassed intention on the part of the child to give to the parent. Applying these considerations to the present case, it is difficult to say that the transaction could have been maintained if the case had rested upon the mere circumstances which attended the original gift. I think that it could not. I am satisfied that the court would be departing from established principles in upholding it. The transaction had its inception at a period when the minority had just terminated. It was completed while the parental influence and authority was in full force, and there was no independent advice given to the daughter. The transaction, therefore, was impeachable at and after its completion; and the only question is, whether it has become unimpeachable by

reason of what has subsequently occurred. It has been argued at the bar that it has not; for that some positive act was required to make it so, and that here no such act has been done. I am not of opinion that a positive act is necessary to render the transaction unimpeachable. All that is required is proof of a fixed, deliberate, and unbiassed determination that the transaction should not be impeached. This may be proved either by the lapse of time during which the transaction has been allowed to stand, or by other circumstances. Here I have no doubt that there was a fixed, deliberate, and unbiassed determination on the part of the lady that the transaction should not be impeached.' No doubt the fact of the subsequent marriage of the lady who was the donor in that case, and, indeed, the whole of her life, was consistent with that judgment. The lord justice continues: 'It is stated on the face of the bill that the daughter had been informed by some of her friends before her marriage that a fraud had been practised on her by the defendant. Now she was plainly a woman of strong understanding and capable of transacting business, and it is impossible to suppose that she, having been told that a fraud had been practised on her, should not have been aware that the courts could relieve her. And if it were possible to suppose this, the facts of the case exclude the supposition.' Therefore, it must be taken that in that case the donor knew as a fact that the transaction was impeachable. At the same time, that case is very near this one, if we may treat this case as if there had been a finding of the jury that the donor was indifferent

how onerous, and a money lender, who has money enough to satisfy such greed, cunning enough to hold the borrower whom he once entangles in his toils, and rapacity enough to extort exorbitant interest, we have the ingredients of another line of cases of undue influence in which the corrective powers of courts of equity have been beneficially employed. Money lenders of this kind occupy positions of authority in reference to an unfortunate client. They are few in number; when once they are applied to, they occupy a position of power from which it is difficult to eject them. Hence unconscientious bargains by heirs expectant with persons of this class will be set aside.<sup>1</sup> The rule includes remainder-men;<sup>2</sup> and it has been extended to younger sons, with no settled estate in remainder, on the expectation that their friends will pay to avert bankruptcy or exposure.<sup>3</sup> But under this head do not fall bargains for the purchase of vested interests due at a fixed future period.<sup>4</sup> And in England it having been found that the court of chancery had pushed the rule to such an extent as to make it unsafe to purchase reversions unless at public auction,<sup>5</sup> an act was passed by parliament, in 1867,<sup>6</sup> by which it was enacted that no purchase made *bona fide*, and without fraud or unfair dealing, of any reversionary interest, shall be opened or set aside merely on ground of undervalue. The act, however, says Mr. Pollock, "is carefully limited to its special object of putting an end to the arbitrary rule of equity, which was an impediment to fair and reasonable as well as to unconscionable

Necessity of heir expectant may conduce to undue influence.

whether she could set aside the gift or not, so that whether she knew or not would be immaterial." S. C. 8 Q. B. D. 587.

<sup>1</sup> Aldborough v. Trye, 7 Cl. & F. 436; Aylesford v. Morris, L. R. 8 Ch. 484; see Tottenham v. Emmett, 14 W. R. 3; Davidson v. Little, 22 Penn. St. 252.

<sup>2</sup> Beynon v. Cook, L. R. 10 Ch. 391; Miller v. Cook, L. R. 10 Eq. 641; O'Rorke v. Bolingbroke, L. R. 2 Ap. Cas. 814.

<sup>3</sup> Nevill v. Snelling, L. R. 15 Ch. D. 679.

<sup>4</sup> Parmelee v. Cameron, 41 N. Y. 392; Cribbins v. Markwood, 13 Grat. 495. As to "option" see *infra*, § 454.

<sup>5</sup> Bromley v. Smith, 26 Beav. 644; Foster v. Roberts, 29 Beav. 471; Nesbit v. Berridge, 32 Beav. 282; Lord v. Jeffkins, 35 Beav. 7. A sale was set aside after nineteen years; St. Albyn v. Harding, 27 Beav. 11; and another after forty years. Salter v. Bradshaw, 26 Beav. 161.

<sup>6</sup> 31 Vict. c. 4.

bargains. It leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief."<sup>1</sup> And it has been settled that when the transaction is fair, the sale of a contingent legacy, or even of a naked possibility or expectancy of an heir in an ancestor's estate, will be sustained in equity after the ancestor's death,<sup>2</sup> though the burden is on the party who thus dealt with an heir expectant to show the good faith and fairness of the transaction.<sup>3</sup> The equity is one belonging to the heir who is induced to make an improvident bargain, and it is not lost to him by the fact that his father, after whose death he was to inherit the estate assigned away, consented to the bargain.<sup>4</sup> And a party seeking relief of this class is bound to restore that which he received.<sup>5</sup>

§ 170. Where there is no statute forbidding usury, courts of equity feel it peculiarly incumbent on them to revise contracts exacting extortionate interest. "One great effect of such repeal was to bring into operation to a greater extent than formerly another branch of the jurisdiction of this court which existed long before; that principle of the court which prevented any oppressive bargain, or any advantage exacted from a man under necessity and want of money, from prevail-

<sup>1</sup> Pollock, 3d ed. 596, citing *Aylesford v. Morris*, L. R. 8 Ch. 490; *O'Rorke v. Bolingbroke*, 2 App. Cas. 814.

<sup>2</sup> 2 Story Eq. § 1040; *Spence's Eq. Jur.* § 852; 1 Sug. V. & P. 8th Am. ed. 426; *Shelly v. Nash*, 3 Mad. 232; *Lord v. Jeffkins*, 35 Beav. 7; *Nevill v. Snelling*, L. R. 15 Ch. D. 679.

<sup>3</sup> *Cook v. Field*, 15 Q. B. 460; *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814; *Savery v. King*, 5 H. L. C. 627; *Edwards v. Burt*, 2 D. M. & G. 55; *Jenkins v. Pye*, 12 Pet. 241; *Poor v. Hazleton*, 15 N. H. 564; *Boynnton v. Hubbard*, 7 Mass. 112; *Fitch v. Fitch*, 8 Pick. 480; *Powers' Appeal*, 63 Penn. St. 443; *Field v. Mayor, etc.*, 2 Seld. 179; *Bacon v. Bonham*, 33 N. J. Eq.

614, and other cases cited *Bispham's Eq.* § 220.

<sup>4</sup> *Sugden V. & P.* 11th ed. 316; *Bispham's Eq.* § 220; *Aylesford v. Morris*, L. R. 8 Ch. 491, modifying *King v. Hamlet*, 2 My. & K. 456. That such a transaction is in fraud of the ancestor see *Heap v. Morris*, L. R. 2 Q. B. D. 630.

<sup>5</sup> *Wharton v. May*, 5 Ves. 27, 68, 69; *Evans v. Peacock*, 16 Ves. 512; *Boynnton v. Hubbard*, 7 Mass. 112; *Williams v. Man. Co.*, 1 Md. Ch. 306, 3 Md. Ch. 420. In Pennsylvania, in ejectment to enforce a trust of this class, it seems a previous tender is not necessary. *Seylar v. Carson*, 69 Penn. St. 81; *Smull v. Jones*, 1 W. & S. 128; *Hall v. Vanness*, 49 Penn. St. 457.



ing against him—the moment the usury laws were repealed, and the lender of money became entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the court, which prevailed independently of the usury laws, was likely to be called into active operation.”<sup>1</sup>

<sup>1</sup> Stuart, V. C., *Barrett v. Hartley*, 669; cited Leake, 2d ed. 430. As to L. R. 2 Eq. 795; *Miller v. Cook*, L. R. usurious contracts, see *infra*, §§ 461 10 Eq. 641; *Tyler v. Yates*, L. R. 6 Ch. *et seq.*

## CHAPTER X.

### ERROR AND MISTAKE.

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## I. GENERAL PRINCIPLES.

§ 171. THE subject of error (or mistake, as it is sometimes called) is beset with peculiar difficulties. A line has to be taken in such a way as to avoid two extremes, either of which would be fatal to business.

Topic one of peculiar difficulty.

If every error in the mind of either party as to a proposed contract prevents its completion, then there could be no contract completed. No valid marriage could be solemnized, since there is no marriage in which at least one party is not in some slight error as to the other's qualifications; no valid sale of goods could be effected, since there is no sale in which either vendor or purchaser has a perfect idea of the thing sold; no contract of agency could be instituted, since neither principal nor agent can be absolutely free from error as to each other's capacity. On the other hand, consequences equally disastrous would follow from the position that no error, no matter how essential, prevents a contract from being perfected, and from embracing within its operation any property to which it might apparently relate. A bargain which A. supposes he is making with B. would give C. a title to A.'s property, if C. should at the time of the bargain succeed in palming himself off to A. as B. A. might hand a diamond to B., by mistake for a glass bead, and B. would take a title which would be unassailable. A. and B., by a transposition of documents, might sign an agreement in which a thousand shares of bank stock are to be sold by A. to B., instead of a barrel of flour, as was intended, and, if no error prevents a contract from being entered into, title to the bank stock would thereby vest in B. On the one hand, therefore, if we adopt the rule that every error prevents a contract from attaching, no title whatever could be made; on the other hand, if we adopt the rule that no error prevents a contract from attaching, then

no ownership would be secure. We must therefore conclude that, while the mere fact of error in the mind of one of the parties does not prevent a contract from being perfected, there are some errors that have this effect. To determine what these errors are will be the object of the present chapter. In a succeeding chapter will be considered the interesting question how far a party, who, by mistake, leads another to make a void bargain, is liable for the loss to which the other party is thereby subjected.<sup>1</sup>

§ 172. The question of error is much embarrassed by the ambiguity of the terms used. In cases where there is evidently no contract, there having been no consent of minds (as where A. proposes to B., supposing B. to be C., that B. should take command of a ship, B. being a tailor who had never been at sea; or where A., as in a case already put, proposes to sell a diamond to B., supposing it to be a glass bead), no acceptance on the part of one party to the other's proposal can make a contract; yet we are sometimes told that such "contracts" are "voidable" and sometimes that they are "void." "Void" and "voidable" are thus used as convertible terms, though there is this important difference between them, that a "void" contract is no contract at all, whereas a "voidable" contract conveys a title which the party conveying may afterwards ratify, the ratification relating back to the date of the original transaction,—a title which, even before ratification, may be absolute in the hands of a *bona fide* purchaser from the person holding the "voidable" contract.<sup>2</sup> We hear also of "null contracts," though it is hard to see how there can be a contract which is not a contract. In these pages an effort is made to speak of negotiations which do not ripen into contracts, because the parties do not consent to the same thing, simply as "negotiations" or "bargains;" saying, as in the prior section, that in such cases want of consent prevented a contract from being "entered into" or "perfected." Yet, cautious as we may be, it is difficult always to avoid applying the terms "void" or "incomplete contracts" to such negotiations. They are so called

<sup>1</sup> *Infra*, §§ 1043 et seq.

<sup>2</sup> *Supra*, § 28.

in numerous rulings of our courts, and in many of our text-books; and, logically incorrect as is the expression "void contract," it is an expression which has now a definite meaning, being understood to be a negotiation which, though on its face a contract, has no binding force, is incapable of ratification unless with a new consideration, and is incapable of passing title even to *bona fide* purchasers.

§ 173. Another difficulty is the confusion of classification that prevails. As has been pointed out by Savigny, and illustrated with much point by Windscheid, there are three distinct relations in which the question of consent may be considered. These, with their sub-relations, may be thus expressed:—

Also by  
confusion  
of classification.

A. ERROR NOT INDUCED BY MISREPRESENTATION OR FRAUD:

a. Conscious, *e. g.*, where the transaction is in jest.

b. Unconscious, in which case, when essential, no contract is entered into.<sup>1</sup>

B. ERROR INDUCED BY HONEST MISREPRESENTATIONS.—In this case when the error is essential, then, as under the first head, no contract is entered into. When the error is non-essential, but goes to quantity or quality, then the contract binds, but an action lies on the warranty, express or implied; or an abatement is made in the price, when sued on; or specific performance will be refused, unless the complainant will make the misrepresentations good; or, in proper cases, there may be a rescission, saving the rights of the other side.<sup>2</sup>

C. ERROR INDUCED BY FRAUD.—In this case, if the error is essential, then, as under prior heads, there is no contract.—If the error is non-essential, then, in addition to the rights specified under head B, the injured party may have an action of deceit against the party imposing on him.<sup>3</sup>

Much of the confusion observable in our decisions has arisen from the fact that the incidents belonging to one class of error are imputed to another class. To avoid this confusion, Savigny's classification, with some modifications, will be

<sup>1</sup> See *infra*, § 175.

<sup>3</sup> *Infra*, §§ 232 *et seq.*

<sup>2</sup> *Infra*, §§ 186 *et seq.*; 282 *et seq.*

adopted in the following pages, and the cases distinguished on this basis.

§ 174. To a binding juridical act, we must remember, it is essential that not only should there be a will to do the act, but the will must be duly expressed. A mere will to do a thing has no force without the expression. The will, unexpressed, is secret and invisible, and no matter how strong we may imagine it to be in a particular person, or how powerful may be the motives we may conceive of as influencing it, it has no contractual force unless expressed. On the other hand, an expression of will may be robbed of force should it appear that it was unintended. The promises of a person talking wildly in his sleep do not bind him, nor is he bound by promises made by him under radical delusions as to the object of the promise. That this was so may be shown by his subsequent deeds and words. But so essential to society is it that faith should be given to words and deeds as the expression of thought, that the burden of proof is on a party who seeks to show that he acted, when thus apparently expressing his will, under error, or unconsciously.<sup>1</sup>—In our own law, as will hereafter be seen, while a document is to be construed according to intention,<sup>2</sup> this intention is to be gathered from the words used by the parties; and only when there is ambiguity, or when these words were meant to be supplemented by unwritten negotiations based on extrinsic facts, can either extrinsic facts or unwritten negotiations be put in evidence to explain the written text.<sup>3</sup>—In the modern Roman law, the prevailing tendency has been to subordinate the letter to the supposed intent more completely than is the case with ourselves. Recently, however, in view of the looseness of construction to which this led, there has been a reaction towards the position that when words have been selected by the parties to express their views, these words alone are to decide. This is urged by an intelligent expositor:<sup>4</sup> (1) on the ground of practical necessity; (2) on that of logic; and (3)

Will and  
its expres-  
sion must  
coincide.

<sup>1</sup> Savigny, Röm. Recht, § 134.

<sup>2</sup> *Infra*, § 657.

<sup>3</sup> See *infra*, § 629 *et seq.*

<sup>4</sup> L. Scheiff, *Divergenz zwischen Wille und Erklärung*, Bonn, 1879.

on that of positive law. As to the first, the chief example of those who hold that the letter alone is to control, is the case of a person who signs a paper without knowing what it contains, in which case, it is urged by Bähr, it is the letter alone that can determine, as there is no intention whatever. To this, Scheiff adds, that in such cases there is an intention, and that intention is to be bound by whatever shall be placed on the paper.<sup>1</sup> The same remark may be made as to the signing of a cheque with the amount in blank. It may be said that here there is no intention, and that the letter must necessarily exclusively control. But the answer is that the intention is to be bound by whatever the party entrusted with the cheque shall within a certain range enter in it. (2) The logical objection to the assigning absolute supremacy to the intention is, that, as intention is undefinable and unlimited, it cannot determine legal relations. The law, therefore, can deal with intention only as expressed in words. (3) By the Roman standards intention without expression is as inoperative as is expression without intention.—In our own system, while the controversy has not been so radical, there is no question of construction in which it does not emerge. With us, however, the necessity of maintaining intact, for commercial purposes, the sanctity of written terms, is more strongly felt than it was in the old Roman system, in which business was conducted mainly by word of mouth, or than it is in Germany and France, where the traditions of the Roman law remain authoritative. The distinctive position taken by our courts is elsewhere discussed in detail.<sup>3</sup>

<sup>1</sup> See *infra*, § 185.

<sup>2</sup> 4 Kr. Viert. für Gesetz. N S. 160.

<sup>3</sup> *Infra*, §§ 655, 658; Wh. on Ev. § 958. The question whether the will when acting under the influence of error can be regarded as free, is discussed with much subtlety by Savigny. (Röm. Recht, III. § 115.) There is, he admits, some plausibility in the position that error is like unconsciousness in this, that a person in error is unconscious of what he is about. We hold an infant and a lunatic to be under

certain conditions destitute of freedom of will, and several passages in the Roman standards assign the same quality to persons acting in error. "Nulla enim voluntas errantis est," so speaks one of the jurists (L. 20 de aqua (39,3) ); and to the same effect several other citations may be given. But Savigny argues, that the two states—that of ignorance, and that of unconsciousness—cannot be included in the same category. When we say, he argues, that the erroneous concep-

## II. CONSCIOUS ERROR.

§ 175. A promise uttered in jest has no binding force, so far as concerns parties conscious of the fact that it was so uttered. “*Verborum quoque obligatio constat, si inter contrahentes id agatur: nec enim, si per jocum puta vel demonstrandi intellectus causa ego tibi dixero spondes? et tu responderis spondeo, nascetur obligatio.*”<sup>1</sup> This is the case, as the context shows, with promises made in dramatic performances, and as part of exercises of instruction in a foreign language.<sup>2</sup> Analogous cases, as

Promises known to be in jest do not bind.

tion determines the will, this must be taken in a very limited sense. It is the person acting who concedes to the error this controlling force. His freedom of choice between opposite alternatives is unlimited; no matter what may have been the advantages which the error might foreshadow to him, he could reject them. The right conception of the question rests on distinguishing the will itself from prior influences in the mind of the person willing; the will is the substantive fact which must lie at the basis of all juridical relations; and it is both arbitrary and unreasonable to confound the fact itself with the mental processes which precede it. And the context of the passages cited from the Roman law shows that error is a ground for relief from the obligation of contracts only in peculiar cases where it goes to matters of essence, and that even in those cases it does not relieve from liability when it is culpable.

<sup>1</sup> L. 3, § 2, de ob. et act. (41,7). On this topic see *infra*, § 661.

<sup>2</sup> As is noticed by Windscheid (Pand. § 75), the *reservatio mentalis* is without legal significance, since a purely secret condition of mind cannot be shown. When a person says: “I will do this,” it will be presumed he intended what

he says until the contrary is objectively shown.

According to Windscheid (Pand. § 75), simulation is the expression, for the purpose of bringing about an apparent legal relation, of an intention not really entertained. It is possible that the party simulating may have really had another object in view; and in such case, the question arises whether the latter object may not be effected. The answer to this question depends upon, (1) Whether the expression of intention relied on can be regarded as capable of sustaining the particular interpretation; (2) Whether the intention so assumed is one which the law can carry out.

Two interesting essays by Dr. Joseph Kohler, on mental reservation and simulation, will be found in *Ihering's Jahrb.* for 1878, vol. 17, pp. 91-158; 325-356. Dr. Kohler takes the ground that mental reservations are inoperative, because, (1) The law cannot take cognizance of unexecuted mental states, and, (2) The executed purpose is the only purpose that can be regarded as intended. He contests, with much force, Savigny's position that “simulation” is a bilateral mental reservation, and that mental reservation is a unilateral mental simulation. Kohler, on



mentioned by Savigny, may be noticed in the Roman contracts of mancipation, and similar processes, in which words were used symbolically; and illustrations of the same kind may be found in our own bonds, in which cautionary penalties are inserted.<sup>1</sup> The question is, what is the sense in which the promisor knew the promise was accepted by the promisee?<sup>2</sup> If both parties knew that the promise was to be inoperative, it does not bind.

§ 176. A party, however, who consciously and intentionally makes use of false statements to obtain a benefit, not only must submit to have any contract thus induced rescinded at the election of the defrauded party, but exposes himself, as will hereafter be seen more fully, to an action for deceit.<sup>3</sup>

Error when conscious, exposes to action of deceit, and to rescinding of contract.

the contrary, argues that simulation has nothing in common with mental reservation. It involves, he maintains, no disharmony between expression and intention. The actor, for instance, who promises on the stage to pay a hundred ducats to another actor, simulates, but it is understood that the whole transaction is unreal. It is otherwise, however, as to the promise to which a mental reservation is attached. The promise is in no way made inoperative by the mental reservation.

The cases of divergence between intention and expression are thus divided by Scheiff (following in this respect Windscheid):—

1. *Intended Divergence*.—Under this head fall jests, parables used for instruction, and simulation. According to Scheiff, the person making a promise is just as liable when he ought to know that what he said was supposed by the other party to be in earnest, as if he actually knew this was the case.—Mental reservations fall under this head; and a party is precluded from

falling back on them as a defence, (1) Because they are immoral, (2) Because to admit such defences would destroy business.

2. *Unintended Divergence*.—Here a distinction is taken between “confusion” and “error” (“Verwirrung” and “Irrthum”); the first being unconscious action, the second, action under mistake. The latter, which is error in its technical sense, is defined as a “defective or wrong impression of law or fact,” including, therefore, *error juris et facti*. The distinctions taken on this point are noticed, *infra*, § 177.

<sup>1</sup> Promises under duress are subject to similar considerations; *supra*, § 144. An indebtedness based on a fact known to be erroneous, is asserted in such a promise. As against the promisee, the party making the promise may contest the truth of its consideration. That an agreement, which both parties know to be impossible, is a nullity, see *infra*, § 307.

<sup>2</sup> *Infra*, § 657.

<sup>3</sup> *Infra*, §§ 191 et seq. 282.

## III. UNCONSCIOUS ERROR OF APPREHENSION.

§ 177. A consent of two minds to one and the same thing being an essential incident of contracts,<sup>1</sup> it follows that there can be no contract when the parties differ essentially as to the thing they have in view. A distinction is made by the old writers in this respect between error and ignorance. Error consists in a judgment which, resting on incorrect information, is a perversion of the truth, while ignorance is a total want of information as to the particular topic; but ignorance has the same legal effect as error, and may be, therefore, classed under the same head. Error is also, so far as regards the subject matter, divided into error of fact, which, when material, avoids, and error of law which usually does not have that effect.<sup>2</sup> So far as concerns the parties, error is unilateral, when it affects only one party, and bilateral, when it affects both.<sup>3</sup> With regard to the possibility of avoidance, it may be either vincible (*vincibilis*), or invincible (*invincibilis*), under which head are classed, not errors which are absolutely unavoidable, for there are none such, but errors which could not be avoided unless by researches unusual with prudent men under similar circumstances.<sup>4</sup> Error, also, viewed in relation to the effect it has on the will, is regarded as either essential (*error essentialis s. causam dans*) when it touches the substance of the negotiation, or unessential (*concomitans*) when it touches only collateral incidents, or matters of opinion.<sup>5</sup> That there is no contract when there is an essential error by one of the parties is argued by Savigny to be a settled doctrine of the Roman law. “*In omnibus negotiis contrahendis, si error aliquis intervenit, ut aliud sentiat—nihil valet, quod acti sit.*”<sup>6</sup>—Savigny’s position, that where there is an essential error

<sup>1</sup> See *supra*, § 4.

<sup>2</sup> See §§ 198 *et seq.*

<sup>3</sup> As to rectification see *infra*, §§ 205, 602.

<sup>4</sup> As to liability for negligence see *infra*, § 1043.

<sup>5</sup> See *infra*, § 188.

<sup>6</sup> L. 57, D. de oblig. et act. (44, 7).

The following passages are cited by Savigny as bearing on the question in the text: “*Cum non consentiant qui errant. Quid enim tam contrarium consensui est quam error qui imperitiam detegit?*” L. 15, de juris. (2, 1).—“*Error enim litigatorum non habet consensum.*” L. 2, pr. de jud. (5, 1).—

by a party, there is no actual consent,<sup>1</sup> is spoken of by Windscheid,<sup>2</sup> as “epoch-making” in the doctrine of error; and he is sustained in this by the great body of German jurists.<sup>3</sup> Windscheid, who occupies (1882) the highest rank as a commentator on the Roman law, adopts substantially the same position.<sup>4</sup> Error, according to his definition, is where a party has no consciousness that he does not really intend that which he professes to intend. “He believes either that what he says has a different meaning from what it really has, or that he uses different language from what he really does.” The promise of a party made under such an error, it is sometimes said, is a nullity on account of the error. According to Windschied, however, this is not accurate. The nullity

“Nulla enim voluntas errantis est.” L. 20, de aqua plu. (39, 3).—“Non videntur, qui errant, consentire.” L. 116, § 2 de R. J. (50, 17).—“Cum errantis voluntas nulla sit.” L. 8, c. h. t.—But that these maxims are not to be held to imply that any kind of error prevents any kind of consent to a contract, is shown not only by the context, but by the whole doctrine of *dolus* wrought out with such care and completeness by the Roman jurists. There would be no necessity in any case to prove *dolus* (fraud) in order to rescind a contract, since, if there were any error, no matter how slight, there would be no contract to rescind. But in the Roman law, as well as in our own, fraud is held in many cases as of decisive influence in vacating a contract which would otherwise be held good. The party injured can in such cases hold to the contract and sue for damages, or may rescind the contract; and it is plain, therefore, that error does not as a rule preclude that consent by which contracts must be made.—Error in contracts has been the subject of copious discussion by foreign jurists. The following treatises on error are noticed by Koch: II. 129. Feltz, diss.

i. et ii. de errore in contractibus; Gündling, über die schwere Lehre von dem Irrthum in der Rechts gelertheit; Leyser, de ignorantia et errore; Hankopf, de effectu erroris in contractu emti venditi; Goetz, de errore in transact. etc.; Van Maanen, de ignorantia et erroris natura et effectibus; Kern, de errore contrahentium; Herrman, von den Wirkungen des Irrthums; Kritz, de erroris facti; Thibaut, über die Wirkung des Irrthums; Vallett, Versuche eine von der gewöhnlichen abweichende und einfachere Theorie von dem Einflusse des error und der ignorantia facti auf die Rechts geschäfte aus dem Röm. Rechte und aus der Natur der Sache abzuleiten; Mühlenbruch, über Juris et facti ignorantia; Richelmann, commentatio de facti errore in conventionibus. In addition, the topic is discussed at large in the works of Cujacius, Donellus, Averanius, and Glück.

<sup>1</sup> System Röm. Rechts, iii. 135–9.

<sup>2</sup> Pandekt. § 76.

<sup>3</sup> Wächter, ii. § 102; Vangerow, iii. § 604; Sintenis, i. p. 193; ii. 298; Unger, ii. 89.

<sup>4</sup> Pandekt. 3d ed. § 76.

of the promise does not arise from the error, but from the fact that the promise and the intention do not correspond.—The great merit of Savigny, according to Windscheid, is that he brought into prominence the distinction between error in which the intention and the expression coincide, and error in which they are at variance. In the latter case the transaction (supposing the error to be essential) is vitiated not because of the error, but because of the variance. If there was another intention, as is usually the case in such errors, such intention cannot be the basis of an obligation; since intention without words is as inoperative as words without intention. From this follows the important position that nullity is not excluded in cases where the error was negligent, though in such cases negligence may estop.<sup>1</sup> According to Windscheid, however, it is not sufficient to avoid a promise that it was made under an error; it is necessary that the thing promised either in its entirety (as where a party signs a wrong document), or in one of its essential constituents, was not intended. As essential constituents Windscheid enumerates:—

1. The nature of the obligation.

2. The person to whom the obligation is made.—Nullity, however, under this head, is predicated only when the promisee is mistaken by the promisor for another person; not when he has the very person in mind whom his language indicates, and when his mistake is in assigning to such person unreal qualities. Of the latter class of mistakes, the following stages are noticed: A promise is made to a party who gives an erroneous Christian name; to a party who gives an erroneous family name; to a party who gives the name of another person of whose existence the person promising is not aware; to a party who gives the name of another person whose existence is known to the promisor, or is accepted by him as existing. In the last case, an error as to the person, strictly speaking, cannot be said to exist any more than in the first; but the constituents of personality in the last case are essential, while in the other cases they are non-essential.

3. The object of the obligation. If this object is defined

<sup>1</sup> As to liability for negligence see *infra*, § 1043.

quantitatively, then a material variance as to quantity is error that avoids.<sup>1</sup>

4. So far as concerns the incidents of the obligation, a distinction is to be taken between such as according to existing business standards constitute the essence of the object, and such as do not.—If the promisor erroneously assigns to the object properties of the first class, then his declaration, as relating to something which essentially, if not corporeally, he did not have in mind, is a nullity. An error, on the other hand, as to properties of the second class, does not avoid this obligation.<sup>2</sup> An error, for instance, as to the metal of which a vase is composed, brass being mistaken for gold, is essential, and avoids the bargain, the particular kind of metal being here material; whereas, an error as to the particular kind of wood used for a bucket—*e. g.*, pine or hemlock—is not essential, and does not avoid, unless the contract be for some reason dependent on the kind of wood used. The question whether, when the object of a promise has been injured, its essential properties are changed, depends, therefore, in default of a special bargain, on the particular case.<sup>3</sup>

The supremacy of Savigny's doctrine is, however, by no means unchallenged. By eminent recent critics<sup>4</sup> not only is the accuracy of Savigny's commentary on the authorities disputed, but the rule that essential error avoids is declared

<sup>1</sup> See *infra*, §§ 188 *et seq.*

<sup>2</sup> Whether by blundering he does not render himself liable in other respects, will be hereafter discussed. *Infra*, §§ 1043 *et seq.*

<sup>3</sup> It is argued by Windscheid that a variance only avoids where the intention falls behind the expression, not where it exceeds it. Thus a party, according to the Roman standards, who makes a bargain for a pledge on a bronze vessel, which turns out to be gold, he supposing it to be gold, is bound by his bargain. (L. 1, § 2, D. de pign. act. 13, 7.) As unessential points, according to Windscheid, are to be considered the peculiarities (*Eigenschaften*) of the person whom the de-

clarant has in mind; the name of this person; the name or unessential peculiarities of the object of the declaration; the accessories of such object.—With respect to contracts, as Windscheid (§ 77) proceeds to notice, there is an additional element of error, *viz.*, when one party mistakes what the other party has said. Here, if the mistake is essential, there is no consent. But here, also, it is not the error that avoids, but the want of consent. Hence, when the difference goes to a non-essential point, there is no avoidance.

<sup>4</sup> See review in Zitelmann's *Irrthum und Rechtsgechaft, eine psychologische-juristische Untersuchung*, Leipzig, 1879.

to be subject to so many exceptions as to be practically nugatory. These exceptions are: (1) Negotiable paper, bills of lading, etc., are governed, as to third parties, by their words, irrespective of the question of error. (2) A "foreign captain" gives signals of distress by mistake, but under such circumstances as make it highly probable that such signals would be given by him. A steam-tug is sent to him with a pilot, but he rejects the proffered aid, and arrives safely in port. In the mean time another ship, from this cause losing the services of the pilot and tug, runs ashore. The "foreign captain"<sup>1</sup> would be liable under the port laws for the expenses of the pilot and tug, notwithstanding he acted under an essential mistake. And this is undoubtedly true, though not necessarily on the ground of contract, since the captain in such case would be liable for negligently making signal. (3) Registrator X., to take another case,<sup>2</sup> likes "Manzipan" (a kind of German cake), and dislikes macaroons (Makronen). In order to be sure he himself writes the order to the confectioner, but is surprised at finding a macaroon-tart on the table. It is sent back, but the confectioner produces the order, "Makronentorte," signed by Mr. X. Now Mr. X.'s "error in essence" would be no defence to a suit against him on this order.—Another case is as follows: "C. Eicken," during the French-German war, receives an order to buy, in Posen, a large amount of oats at any price. He executes the contract, but, as he is about to forward the oats, he finds that the order was meant not for him, but for "F. Eicken." The party sending the order refuses to accept the oats, which in the mean time have greatly fallen.—In another case a house is offered for rent, according to the written terms, at 1800 marks, payable quarterly, at end of term. As the lessee is about to move in his furniture, the lessor refuses admission on the ground that he did not mean what the writing said, and that it contained two clerical errors: "1800" for "2800," and "postnum" for "praenum."—Now, in such cases, it would

<sup>1</sup> This illustration is given by Bekker in *Kritische Vierteljahrsschrift für Gesetzgebung*, 1879, 48.

<sup>2</sup> *Ibid.*

not be pretended that the party from whom the writing proceeds is not bound by the writing. This was substantially ruled in Germany in a famous case,<sup>1</sup> in which a telegraphic message had in it "buy" instead of "sell."—It is maintained that the common sense view of such transactions is that a party is to be bound by what he writes. It is urged, also, that the whole doctrine of consent, as taught by Savigny, rests on the erroneous hypothesis that it is intention and not expression that constitutes a legal act. This is admitted to be the case with wills, in which the *voluntas testatoris* is to prevail. It is otherwise with contracts; and, in contracts, the party accepting takes the will of the other as expressed. This is what is relied on by the promisee; and the promisee acts in consideration of the equivalent that is to be given him for the services called for in the other party's proposal. The error of the prevalent view, so it is insisted, is, that, while it seeks to maintain without restriction the right of the party mistaken to do as he really intends, it allows him to invade at his pleasure the rights of others and subject them to his undeclared and arbitrary will. If this were carried out—if the burden of a mistake fell, not on the party making it, but on the other party—then all business security would be destroyed. An order by telegram could not be filled without inquiry to see whether or no it was not made under a mistake, and to these inquiries there might be no end; or indemnity might be exacted, which would add greatly to the burdens of the transaction.—The reply to this, that a party making a mistake in a written order is liable for *culpa in contrahendo*,<sup>2</sup> and in this way he is made to pay the losses incurred by the other side through his conduct, is anticipated by Bekker, who makes in answer the following points: (1) the remedy on the contract is more simple and effective; (2) to have recourse to *culpa in contrahendo* is to unnecessarily introduce penal remedies into civil jurisprudence.—This is undoubtedly ingenious; but it should not cause us to overlook the fact that, when the parties do not agree as to the object of their bargain, there can be no contract. If I should intend, for

<sup>1</sup> *Oppenheim v. Weiller*.

<sup>2</sup> *Infra*, § 1043.

instance, to sell a house; and the other party should intend to buy a ship, there is no agreement between him and me. This, however, does not preclude my liability to him for *culpa in contrahendo* in case he is damaged by my inaccuracy of expression.<sup>1</sup> In our own law, it is also to be observed, the doctrine of estoppel comes in to impose a liability in such cases on a party who, although not bound by force of a specific contract, is precluded by his conduct from denying his liability to a party whom he has induced to assume certain obligations.—The distinction between essential and non-essential error is also discussed by Scheiff in a treatise elsewhere noticed.<sup>2</sup> In bilateral obligations, error, according to Scheiff, precludes consent in two cases: (1) where with either party there is an essential variance between intention and expression; and (2) when in consequence of error the expressions of the parties do not go to the same thing.—Savigny's view is also contested in a work published, in 1880, by Dr. Emil Pfersche.<sup>3</sup> Error in substance, it is argued, is simply an error of judgment, and does not involve a variance between intention and expression. The party bargaining under this error intends what he says; and if the other party says the same thing, then there is a concurrence of the two minds. This is sustained by a copious examination of the Roman standards, which, however, are often subjected, in order to support the author's argument, to forced and unnatural constructions; and while there is no doubt much truth in the position taken by him that *error in substantia* does not necessarily involve a variance between intention and expression, yet it does in most instances involve a variance between the intentions of the two contracting parties. He further argues, that errors as to the properties of a thing, essential or unessential, are always errors in motive.—The declaration, "I buy this thing," is a normal expression of will, no matter what may have been the mistake of the party

<sup>1</sup> See *infra*, § 1043.

<sup>2</sup> Divergenz Zwischen Wille und Erklärung, 1879, cited *supra*, § 174.

<sup>3</sup> Zur Lehre vom. sog. error in sub-

stantia — Römisch-rechtliche Untersuchung—Graz, Leuschner und Lubenzky.



as to the properties of the thing. It is true, he admits, the Romans assimilated *error in substantia* to *error in corpore*. But this was not from the false theoretic stand-point that *error in substantia* was of the same class as *error in corpore*, but from practical considerations. Nullity in such cases was not a logical necessity, but an arbitrary fiction, in order to obtain for the purchaser a safeguard, the *condictio pretii*. In such cases, as, through the *condictio pretii*, the vendor was indemnified from loss, and as between the two theories the only difference was, whether the purchase-money was to be obtained by the *condictio* or by the *actio emti*, the question was merely processual, having no practical consequence, and hence is not discussed on principle by the classical jurists. The rule they laid down was that the purchaser, whether the contract was a nullity or an existing fact, was entitled to recover the price of an article which was deficient in material properties he believed on good grounds and without negligence to belong to it. The old doctrine of nullity in case of essential misapprehension was only thrown out speculatively; was of no practical consequence; and should have no place, as in itself unreasonable, so it is argued, in the Roman common law. By that law, justice is fully done through the rule of warranty, express and implied, that it lays down (*Gewährleistung*). The vendor is held for properties which he knew or ought to have known the purchaser believed the goods to possess, and he is obliged, if these properties fail, to return the price *pro tanto*.—In an article by Brandis,<sup>1</sup> an authoritative contemporaneous German jurist, the prevailing doctrine in Germany is stated now to be, that error as to the juridical nature of a transaction is always essential, but that error as to a person is only essential when the intention was directed specifically to such person, and error as to properties of a thing (*Eigenschaften*) is only essential when the contract was made on account of such properties. This view is reiterated by Windscheid, in an edition of his commentary published in 1880, and by Ihering, in an essay published in 1881.<sup>2</sup> Notwithstanding,

<sup>1</sup> Kritische Vierteljahrschrift, etc., vol. iv. (N. S.) 1881, p. 202.

<sup>2</sup> *Infra*, §§ 1043 et seq.

therefore, the ingenious and plausible criticisms to which it has been subjected, the doctrine that essential error by either of the parties precludes a contract still holds its supremacy in German jurisprudence. Whatever apparent failures of justice may arise from maintaining this view are compensated for by the application of estoppel in cases where a party inequitably attempts to repudiate an engagement into which he negligently led another, and by making him independently liable in such cases in a suit for negligence.<sup>1</sup>

<sup>1</sup> Ibid. According to Windscheid, the error which prevents the inception of a contract is of two kinds: first, that which exists when the thing done is not intended to be done; secondly, that which exists when the thing done was intended, but the effect is different from that which was intended. Under the first head falls the use of unintended words, or the doing of unintended acts; under the second head falls the doing or saying of things which have an effect entirely different from that which was supposed, as is the case where a wrong document is signed by mistake, or where one person is erroneously addressed supposing him to be another person. Brinz and Holden, both high authorities, deny that the second of these cases falls under the head of error, insisting that the only error that avoids a contract is that which consists in a variance between the intention and the expression of intention; when the "*Erklärungshandel nicht gewollt sei.*" On the other hand, Windscheid, in subsequent editions, reiterates his old position, though without any additional argument. By Dr. Zitelmann, in a treatise containing 600 pages of ingenious psychological as well as judicial exposition (Leipzig, 1879), the doctrine that error avoids is applied to all cases in which the error goes to the individuation of the object of the contract.

Dr. Emil Pfersche, in a treatise already noticed, dissents, as we have seen, from the doctrine as to nullity from substantial error. He holds that in all cases of sales the vendor is bound for all the properties of the thing sold which he knew, or ought to have known, that the purchaser supposed the thing to possess. This liability, however, only extends to cover the damage which the purchaser might sustain; though in cases of material mistake, the court may direct the rescinding of the contract as an alternative for abatement of the price. He further argues, that a bargain as to a designated object will not be invalidated by the fact that one of the acting parties is in error as to the properties of the object.

The prevalent doctrine is contested by G. Hartman, in *Ihering's Jahrb.*, 1881 (vol. xx. 1). He argues that there is no other way to make this doctrine operate logically than by so extending the area of intention as to cover all future contingencies. A party, for instance, contemplates a particular contingent result, and if the prevalent doctrine be sound, a promise based on such contingency does not operate if the two parties have not prescience of the thing contingently to happen. It is true, that according to the advocates of the prevalent view, there may be such a thing as an indefinite intention,—*ein unbes-*

§ 178. In our own law, the same rule is now generally recognized.<sup>1</sup> Undoubtedly there are many cases of apparent conflict as to details. But on the general question, there is almost an unbroken line of authority, to the effect that there is no contract when the parties have in mind essentially different things.<sup>2</sup> A party may be estopped from denying what he said; but unless this be the case, and this is only so when it is equitable he should be so estopped, he is not contractually bound to something essentially different from what he had in mind.

In our own law the same view obtains.

§ 179. Cases of error are to be distinguished from cases of impossibility of performance, to be hereafter discussed.<sup>3</sup> It is true that where the impossibility arises from a fact in existence at the time

Error to be distinguished from impossibility of performance.

timtete Absicht,—and when such an intention exists, a contract is perfected if the parties unite in this indefinite intention.—But it is answered by Hartmann, that there is no such thing in reality as an indefinite intention. The doctrine that there can be no effect except in accordance with intention, he argues, is without recognition in practical jurisprudence. After discussing the applicability of the citations made in support of the doctrine from the earlier jurists, he goes on to ask whether, when a particular word is spoken in business, that word is not taken in its ordinary sense, and whether this sense does not necessarily bind all persons relying on its truthfulness and good faith. A party, for instance, who in a guarantee (Bürgschaftschein) uses the term “Mark” instead of “Thaler,” is bound to the party dealing with him in good faith for the Thaler.—By F. Mommsen, an adherent of the prevalent doctrine, it is conceded that in many cases of *bona fide* sales and bailments, words are to be taken in the sense in which the promisee accepted them. And it is also conceded by Windscheid, that a party who

negligently misuses a word cannot set up a meaning personal to himself against the meaning which the word generally holds.—The conclusion reached by Hartmann is, that nullity on the ground of essential error is to be practically limited to cases of ambiguous utterance in which the rule “*clarius loqui debuisset*” bears equally on both parties, and where neither party can equitably claim to force his own interpretation on the other. This does not differ very widely from the rule stated in the text, that where there is no negligence a party cannot be bound to an engagement essentially different from what he intended, but that he may be estopped as to *bona fide* parties by an ambiguous utterance.

Further citations on this topic will be found *infra*, §§ 1044 *et seq.*

<sup>1</sup> See Pollock on Cont. Wald’s ed. 400; Kerr on Fraud and Mistake, 436; Benj. on Sales, 3d Am. ed. § 50; 2 Kent, Com. 470; Smidt v. Tidon, L. R. 9 Q. B. 446, and cases cited *infra*, §§ 180, 186.

<sup>2</sup> *Supra*, § 4; *infra*, §§ 180 *et seq.*

<sup>3</sup> *Infra*, §§ 296 *et seq.*

of the bargain (*e. g.* the destruction of the thing bargained for, of which the parties were ignorant), the cases have something in common.<sup>1</sup> But in cases of impossibility, the nullity of the transaction is in no wise dependent on the error of the parties; a party may be secretly apprised of the impossibility of performance, yet this does not make impossibility of performance any the less a defence for him, though he may have made himself liable in an action for deceit.<sup>2</sup> The question in such case is not one of consent to a contract; it lies in a different domain, that of performance of a contract.<sup>3</sup>

§ 180. When there is an essential error as to parties to a negotiation, it stands to reason that this negotiation cannot become a binding contract.<sup>4</sup> A., for instance, marries B. under the impression that B. is C. There has been a false personation, or an accidental transposition of parties in such a way that the blunder was not discovered until after the ceremony. In such cases it could not be maintained that there was a valid marriage between A. and B. The distinction between essential and non-essential error (*i. e.* between error that goes to identity, and error that goes to mere accident) is here well illustrated. A. marries B., under the impression that A. is rich, and A. turns out to be a pauper; but in this case, as the error is not to identity but to accident, there is a contract that binds.<sup>5</sup> Or, the object being to employ a specialist of great celebrity, a letter is sent to the specialist in question, but is received by

<sup>1</sup> *Hitchcock v. Gidding*, 4 Price, 135; *Conturier v. Hastie*, 5 H. L. C. 673; *Allan v. Hammond*, 11 Pet. 63.

<sup>2</sup> L. 6, pr. L. § 2, de Contr. emt. (18.1).

<sup>3</sup> Savigny, Röm. Recht. III. 304.—Mr. Pollock (Wald's ed. 425) treats cases of this class under the head of mistake. They undoubtedly involve mistake, but the *differentia* is objective; it is the non-existence of the object of the contract, which is a defence, so far as specific performance is concerned, irrespective of the *scienter*. At the same time, a

party, by asserting the existence of a non-existent condition, may estop himself from asserting the non-existence of such condition.

<sup>4</sup> See as to false personation, *infra*, § 183.

<sup>5</sup> *Infra*, § 265. An apparent exception to this rule is recognized in states in which it is held that for a woman with child by another person to conceal this fact from a man whom she marries avoids the marriage. *Infra*, § 265. To the same effect is the Roman law. Koch, *ut supra*, 141.

a person bearing the same name, who accepts the proposal. Here there is no contract, though it would be otherwise were the letter sent to the person for whom it was intended, under a mistaken idea of his qualifications.<sup>1</sup> If an author, also, contracts with a publisher to write a book, the contract is personal with the publisher, and cannot be assigned by him to a third party.<sup>2</sup> Or, indentures are executed by which an apprentice is bound to a particular master, in which case (supposing the indenture does not otherwise provide, or there is no enlarging local custom), there can be no assignment by the master to a stranger.<sup>3</sup> Or, certain discretionary power is given to a particular broker, in which case such power cannot, without the principal's assent, be transferred to another broker.<sup>4</sup> Or, A., intending to buy from B., against whom he has a set-off, proposes by mistake to buy from C., in which case a mistake as to the person dealt with prevents the contract from coming into existence from want of assent.<sup>5</sup> Or, the owner of land agrees to lease it, as he supposes, to an experienced farmer, and an impostor takes the farmer's name, and enters on possession; in this case no title passes, though it would have been otherwise had an intended lessee taken the land under a mistake by the owner as to his qualifications.<sup>6</sup> Even in those systems of jurisprudence in which error in other respects is held not necessarily to preclude the making of a contract, this effect is imputed to error as to the identity of the person with whom the negotiations are had.<sup>7</sup> An agreement to sell to a firm alleged to be composed of particular persons does

<sup>1</sup> See *Chapin v. Longworth*, 31 Oh. St. 421.

<sup>2</sup> *Stevens v. Benning*, 1 K. & J. 168; *Hale v. Bradbury*, L. R. 12 Ch. D. 886.

<sup>3</sup> *Cooper v. Simmons*, 7 H. & N. 707; *Davis v. Coburn*, 8 Mass. 299; *Com. v. Vanlear*, 1 S. & R. 248; *Com. v. Jones*, 3 S. & R. 158; *Biggs v. Harris*, 64 N. C. 413; *Spears v. Snell*, 74 N. C. 210. Otherwise when there is statutory provision. *Hunsucker v. Elmore*, 54 Ind. 209; see *Johnson v. Dodd*, 56 N. Y. 76.

<sup>4</sup> *Henderson v. Barnwall*, 1 Y. & J. 387; *Cochran v. Irlam*, 2 M. & S. 301; *Locke's App.*, 72 Penn. St. 491.

<sup>5</sup> *Benj. on Sales*, 3d Am. ed. § 58; *Mitchell v. Lapage*, Holt, N. P. 253; *Boulton v. Jones*, 2 H. & N. 567; *Boston Ice Co. v. Potter*, 123 Mass. 28.

<sup>6</sup> But see *Hunter v. Walters*, L. R. 7 Ch. 75.

<sup>7</sup> *Koch*, op. cit. § 77; see *Bispham's Eq.* § 190; *Kerr on Fraud and Mist.* 406, 436.

not sustain a contract to sell to a firm differently composed;<sup>1</sup> nor can one partner introduce an assignee into the firm without his co-partners' consent;<sup>2</sup> nor can an agent introduce a sub-agent, in matters involving discretion, without the principal's assent;<sup>3</sup> and as a general rule, when the authority conveyed in a mandate of agency is one which requires peculiar aptitude in, and conveys peculiar discretion to the agent, the agent, except in cases of necessity, cannot transfer his duties and authority to a substitute.<sup>4</sup> An attorney-at-law, therefore, cannot, in discretionary matters, without his client's assent, convey his authority to a deputy;<sup>5</sup> nor can an auctioneer, with discretion, transfer such discretion to a stranger.<sup>6</sup>—So far has this principle been pushed in our common law, that it has been held that in all cases involving personal indebtedness, a creditor cannot be compelled to accept satisfaction except from his immediate debtor.<sup>7</sup>—On the other hand, when by the mistake as to person no injury is wrought, it is not a ground to set aside the contract. "In the common case of a trader who sells for cash, it can make no possible

<sup>1</sup> Mitchell v. Lapage, Holt, N. P. 253.

<sup>2</sup> Pollock, Wald's ed. 411; Lindley on Part. i. 717.

<sup>3</sup> Wh. on Agency, § 28.

<sup>4</sup> See on the general question, Wh. on Agency, §§ 28, 579, 645, 709, 756; 2 Kent, Com. 633; Miles v. Bough, 3 Ad. & El. (N. S.) 845; Henderson v. Barnwall, 1 Y. & J. 387; Cochran v. Irlam, 2 M. & Sel. 301; Warner v. Martin, 11 How. 209; Emerson v. Hat Co., 12 Mass. 241; Lyon v. Jerome, 26 Wend. 485; Evans v. Waln, 71 Penn. St. 69; Locke's App., 72 Penn. St. 491; Adams v. Jacoway, 34 Ark. 542.

<sup>5</sup> Paddock v. Colby, 18 Vt. 485; Bleakley in re, 5 Paige, 311; Pollard v. Rowland, 2 Blackf. 22; Johnson v. Cunningham, 1 Ala. 249.

<sup>6</sup> Coles v. Trecothick, 9 Ves. 234; Stone v. State, 12 Mo. 400. As to false personation, see *infra*, § 183.—Savigny, on the topic before us, cites the follow-

ing Roman rulings: If I receive a loan from Sejus, which I suppose comes from Gaius, this imposes no obligation on my part to Sejus; "non quia pecuniam tibi credidi, hoc enim nisi inter consentientes fieri non potest." L. 32 de rel. cred. (12.1).—If I prefer to loan money to Titius, a man of means, whom I do not personally know, and another person comes to me in his name, and obtains from me the money, this gives the latter no title, and he becomes criminally responsible for the false personation. L. 52, § 21, L. 66, § 4 de furtis (42.2).

<sup>7</sup> James v. Isaacs, 12 C. B. 791; Lucas v. Wilkinson, 1 H. & N. 420; Robinson v. Davidson, L. R. 6 Ex. 269; Mullen v. Eno, 14 N. Y. 597, cited Wald's Pollock, 410. See *infra*, §§ 184, 506-7; and see also, as to novation, *infra*, § 852.

difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract."<sup>1</sup> The dealing is with a generic person, not a specific person; and if there be no essential failure as to the solvency of the person dealt with, there is no avoiding error. And when a purchaser, after being put on his guard as to a mistake of identity, persists in dealing with the vendor, he cannot set up his mistake as a defence.<sup>2</sup>

§ 181. An essential error as to the subject matter of a bargain may prevent the inception of a contract in the following cases:—

And so as to error as to subject matter.

1. When a party undertakes to alienate that which is unalienable.

2. When he buys something belonging to himself, supposing it to belong to another.<sup>3</sup>

3. When he gives in delivery another person's goods instead of his own; though in such case, if the error is not as to identity but as to title, the contract is good, and he must respond in damages if the thing be recovered from his vendee.\*

<sup>1</sup> Benj. on Sales, 3d Am. ed. § 58.

<sup>2</sup> *Mudge v. Oliver*, 1 Allen, 74; see *Boston Ice Co. v. Potter*, 123 Mass. 28.

<sup>3</sup> Leake, 2d ed. 341; *Bingham v. Bingham*, 1 Ves. Sen. 126; *Cochrane v. Willis*, L. R. 1 Ch. 58; *Jones v. Clifford*, L. R. 3 Ch. D. 779. "A stipulation to purchase one's own property is 'naturali ratione inutilis,' as much as if the thing was destroyed, or not capable of being private property." *Pollock, Wald's ed.* 127. Cases of agreements held void on the ground that the parties were mistaken in holding that the estate of one of them was materially burdened in a way in which it was not burdened, will be found in *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Broughton v. Hutt*, 3 De G. & J. 501. To the same effect *Mr. Wald (Wald's Pollock, 428)* cites *Jordan v. Stevens*, 51 Me. 78; *Martin v. McCormick*, 8 N. Y. 331. In Pennsylvania conveyances in mistake of rights have in like man-

ner been set aside. *Leek v. Cowley*, 10 S. & R. 176; *Allen v. McMasters*, 3 Watts, 181; *Horbach v. Gray*, 8 Watts, 492; *Gross v. Leber*, 47 Penn. St. 520; *Huss v. Morris*, 63 Penn. St. 367; *Russell's App.*, 75 Penn. St. 269. Though it is otherwise when the mistake is as to a general principle of law. *Infra*, § 198; *Good v. Herr*, 7 W. & S. 253; *Meckley's Est.*, 20 Penn. St. 478; *McAninch v. Langlin*, 13 Penn. St. 371; *Gross v. Leber*, 47 Penn. St. 520. Under this head may be considered cases of impossibility of performance, hereafter discussed. *Infra*, §§ 296 *et seq.*

In *Peters v. Florence*, 38 Penn. St. 194, relief was refused to a party paying off a mortgage in mistake of his own liability; though this case may be gravely questioned.

<sup>4</sup> *Infra*, § 230; *Koch, ut supra*, citing L. 16, pr. D. eod.; L. 10, C. eod.; L. 35, D. de acqui. rer. dom. (41, 1).

4. When he pays money under a mistake of fact; in which case, by both the Roman and our own law, the money paid may be recovered back.<sup>1</sup>

5. When he buys personal property to which the vendor has no title; in which case, by our own law, the vendee may treat the contract as a nullity.<sup>2</sup> And in all cases of sale or bailment, "a common mistake of this kind may be available for rescinding the conveyance after completion of the contract, although, in general, after completion, the only remedy of a purchaser, in respect of title, is upon the covenants of title, if any, given by the vendor."<sup>3</sup>

6. When a party receives as a gift what the other party meant as a sale, he not being informed that the article was sent to him to be bought by him, and honestly and non-negligently believing it to be a gift.<sup>4</sup> "If A. sends a case of wine to B., intending to sell it, but fails to communicate his intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price either in law or equity, if he be blameless for the mistake."<sup>5</sup>

7. Where a party sells under a non-negligent essential mistake as to the character of the thing sold.<sup>6</sup> This is eminently the case when the party selling has been imposed upon, either intentionally or unintentionally, by others.<sup>7</sup> Thus equity will give relief in cases where aged and infirm persons are induced by erroneous information to sell property at a price far below its value.<sup>8</sup>

<sup>1</sup> *Bell v. Gardiner*, 4 Man. & G. 11; *Kelly v. Solari*, 9 M. & W. 54; *Waite v. Leggett*, 8 Cow. 195; *Wheaden v. Olds*, 20 Wend. 174; *Mayor of N. Y. v. Erben*, 38 N. Y. 305; *infra*, §§ 186, 520, 742 *et seq.*

<sup>2</sup> *Infra*, § 230; Story on Contracts, § 533; *Allen v. Hammond*, 11 Peters, 63; *Bradeen v. Brooks*, 22 Me. 463.

<sup>3</sup> *Leake*, 2d ed. 341, citing *Bingham v. Bingham*, 1 Ves. Sr. 126; *Clare v. Lamb*, L. R. 10 C. P. 334; *Hart v. Swaine*, L. R. 7 C. D. 42. See to same general effect *Montgomery Co. v. Am.*

*Emigrant Co.*, 47 Iowa, 91; *Burkham v. Daniel*, 56 Ala. 604, and cases cited *infra*, § 191.

<sup>4</sup> *Infra*, § 199.

<sup>5</sup> *Benj. on Sales*, 2d Am. ed. 373. adopted in *Pollock*, Wald's ed. 407. The question of error in law, as ground for relief, is independently discussed in a succeeding section (*infra*, § 198).

<sup>6</sup> *Infra*, §§ 187 *et seq.*

<sup>7</sup> *Supra*, § 161; *infra*, § 214.

<sup>8</sup> *Supra*, § 165; *Mason v. Pelletier*, 82 N. C. 40; *Dalton v. Dalton*, 14 Nev. 419.



§ 182. When only a bare charge of chattels is given by the owner to a bailee, no title passes to the bailee, there being no concurrence of minds to one and the same disposition of the particular thing.<sup>1</sup> Hence, when the owner of bank notes gives them to be changed to a party who takes them avowedly for this purpose, but afterwards appropriates them, no title passes.<sup>2</sup> "A parting with the property of the goods could only be effected by a contract, which required the assent of two minds; but in this case there was not the assent of the mind either of the prosecutor or of the prisoner, the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter but to steal."<sup>3</sup>

No title passes when only bare charge is given.

§ 183. If A., falsely claiming to be B.'s servant, or to have been sent for the goods by B., obtains goods from C., C. intending them for B., then, as there is no contract between A. and C., no title to the goods vests in A. There is no consent of minds to one and the same thing; the property remains in C.<sup>4</sup> This rule applies to all cases of false personation.<sup>5</sup> And it has been ruled in the House of Lords<sup>6</sup> that a person thus fraudulently obtaining goods passes no title even to an innocent vendee.<sup>7</sup>—It is otherwise, however, when the mistake is as to the merits or solvency of a particular person. It is on this distinction that the legislation and consequent adjudications on the subject of false pretences are based. Property does not pass in

No title passes in false personation.

<sup>1</sup> Wh. Cr. L. 8th ed. § 915 *et seq.* See *infra*, §§ 292, 730 *et seq.*, 793. As to *bona fide* purchaser see *infra*, §§ 211, 291, 347, 352.

<sup>2</sup> Wh. Cr. L. 8th ed. § 974.

<sup>3</sup> Wood, B., *R. v. Oliver*, cited 4 Taunt. 274; *R. v. Williams*, 6 C. & P. 390; *R. v. Gumble*, L. R. 2 C. C. 1; *Hildebrand v. People*, 56 N. Y. 394; and see fully *infra*, § 291, for other distinctions. That goods thus fraudulently obtained may be followed into other hands, see *infra*, § 734. That there is no market overt in this country, see *infra*, § 734.

<sup>4</sup> *Infra*, § 291; *Hardman v. Booth*, 1 H. & C. 803; *Smith v. Wheatecroft*, L. R. 9 Ch. D. § 223; *Cundy v. Lindsay*, L. R. 3 Ap. Cas. 459, *aff.*; *Lindsay v. Cundy*, L. R. 2 Q. B. D. 96; *s. c.* 1 Q. B. D. 348; *Hollins v. Fowler*, L. R. 7 H. L. 757; *R. v. Gillings*, 1 F. & F. 36; *R. v. Hench*, R. & R. 163; *Moody v. Blake*, 117 Mass. 231; *Barker v. Dinsmore*, 72 Penn. St. 427; and cases cited *infra*, §§ 291–2.

<sup>5</sup> *Cundy v. Lindsay*, L. R. 3 Ap. Cas. 459; *Barnet ex parte*, L. R. 3 Ch. D. 123.

<sup>6</sup> *Hollins v. Fowler*, L. R. 7 H. L. 757.

<sup>7</sup> Wh. on Agency, § 731.

cases of fraudulent personation, but it does pass when there is no such personation, notwithstanding the solvency of the party buying may have been falsely represented by him. And it is to meet the latter classes of cases that the statutes of false pretences were enacted.<sup>1</sup> The general rule is that where there is an essential error as to the identity of parties, this precludes contract, though it is otherwise as to matters relating to solvency or other qualifications.<sup>2</sup>

§ 184. A. cannot, by merely sending goods to B., establish with B. a contractual relation.<sup>3</sup> A contract requires the assent of two minds to one thing; and the mere reception of goods by B., and even their consumption, he not understanding the transaction was meant for a sale, and not negligently misleading A., does not make him liable for their price.<sup>4</sup> This rule has been pushed to its extreme limit in the following case: The defendants sent an order for goods to B., who in the mean time had sold out to C., the plaintiff. C. forwarded the goods to the defendants without notifying them of the change, and then sent on a bill in his own name. This the defendants refused to pay, on the ground that they had never contracted with the plaintiff, and that by this transfer they might be cut out from a set-off they might otherwise have had against B. It was held that the plaintiff was not entitled to recover.<sup>5</sup> And it is a settled rule in the law of agency that a previously undisclosed principal who intervenes in a suit against third parties does so subject to all the equities attaching to his agent.<sup>6</sup> “Every

To recover on contract it is necessary that the contract should have been made with the party suing.

<sup>1</sup> Wh. Cr. L., 8th ed. §§ 1135 *et seq.*

<sup>2</sup> *Supra*, § 180. That a fraudulent contract cannot be rescinded so as to affect *bona fide* third parties, see *infra*, § 291; that party without title cannot pass title, see *infra*, § 292.

<sup>3</sup> *Supra*, § 22.

<sup>4</sup> See cases, *supra*, § 22, and *infra*, §§ 506-7.

<sup>5</sup> *Boulton v. Jones*, 2 H. & N. 564; see to same effect, *Mitchell v. Lapage*, Holt N. P. 253; *Boston Ice Co. v.*

*Potter*, 123 Mass. 28; and comments in Pollock, 408, 458; Benj. on Sales, 47, 324. As to rulings in questions of agency, see Wh. on Agency, §§ 447, 465, 467, 723, 741, 755; and authorities cited *supra*, § 22.

<sup>6</sup> Wh. on Agency, §§ 405, 466, 722, 723, 741; *Humble v. Hunter*, 12 Q. B. 311; *Rabone v. Williams*, 7 T. R. 360; *Warner v. McKay*, 1 M. & W. 595; *Leeds v. Ins. Co.*, 6 Wheat. 565; *Traub v. Millikin*, 57 Me. 63; *Winchester v.*

man has a right to elect what parties he will deal with;”<sup>1</sup> and if third parties come in as principals in a contract in which they had not been previously known, they must do so subject to any set-off or cross-claims against the party actually contracted with. And, for the same reason, an agent suing in his own name for the principal’s debt is subject to the principal’s equities.<sup>2</sup>

§ 185. Signatures may be put unintentionally to documents under the following circumstances:—

1. A party who cannot read has a document falsely read to him, which he signs, believing it to be entirely different from what it is. In this case he is not in any way bound by his signature. There is no contract, for there is no consent to a common thing. And if the party reading to him is one in whom he could without negligence confide, he cannot be made liable by way of estoppel on his signature.<sup>3</sup>

Signature  
to wrong  
document  
does not  
bind.

2. A party who can read has a document shown to him, and its purport falsely stated to him by a person in whom he is entitled to confide. In this case, also, it is argued that

Howard, 97 Mass. 303; *Kingsley v. Davis*, 104 Mass. 178; *Lock’s App.*, 72 Penn. St. 491.

<sup>1</sup> *Chapman, C. J., Winchester v. Howard*, 97 Mass. 303; *infra*, §§ 507, 784.

<sup>2</sup> *Ibid.*; *infra*, § 1021.

<sup>3</sup> *Thoroughgood’s case*, 2 Co. Rep. 9 b; *Swan v. Land Co.*, 2 H. & C. 175; *Kennedy v. Green*, 3 M. & K. 717; *Trambley v. Ricard*, 130 Mass. 259; *Hallenbeck v. Dewitt*, 2 Johns. 404; *Bauer v. Roth*, 4 Rawle, 83; *Briggs v. Evert*, 51 Mo. 249; *Wright v. Macpike*, 70 Mo. 175. How far a party is liable for the consequences of not reading document, see *supra*, § 22; *infra*, §§ 196, 572. As to undue influence, see *supra*, § 58.

In *Foster v. Mackinnon*, L. R. 4 C. P. 704, the judgment of the court, as adopted by Mr. Pollock (3d ed. 429), says: “The position that, if a grantor

or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities; see *Com. Dig. Fait* (B. 2); and is recognized by Bayley, J., and the court of exchequer, in *Edwards v. Brown*, 1 C. & J. 312. Accordingly it has recently been decided, in the exchequer chamber, that if a deed be delivered, and a blank left therein be improperly filled up (at least if that be done without the grantor’s negligence), it is not the deed of the grantor. *Swan v. Land Co.*, 2 H. & C. 175. These cases apply to deeds; but the principle is equally applicable to other written contracts.”

If induced to sign by false representations of legal effect, the party defrauded may elect to rescind. *Infra*, § 201. See also cases cited, *infra*, § 264, to the effect that a surreptitious substitution avoids.

there is no contract because there is no consent;<sup>1</sup> though a party signing negligently may estop himself from disputing with *bona fide* third parties the binding effect of his signature;<sup>2</sup> and to sign negotiable paper in blank works ordinarily such an estoppel.<sup>3</sup> Whether a document under such circumstances is void, or only voidable, has been much discussed. There are high authorities to the effect that a deed executed by mistake, in reliance on a solicitor, is absolutely void when it is in conflict with the real intentions of the party executing.<sup>4</sup> But, as is pointed out by Mr. Pollock, this is inconsistent with *Thoroughgood's* case, and with a recent ruling of the court of appeal in chancery, in which it was said by Mellish, L. J., that "when a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told that it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed, although it may be voidable on the ground of fraud, is not a void deed."<sup>5</sup> And on principle we may hold that, when the filling up of a blank is by an agent, the document, though invalid as between agent and principal, may bind the latter as to third parties to whom he had recognized the agency, and may be subsequently ratified by him so as to validate the original transaction.<sup>6</sup> But whether mere negligence can estop a party from showing that a deed is not actually his own has been doubted.<sup>7</sup> Of course, when a party intentionally signs a blank cheque or a blank note, he binds himself as to *bona fide* third

<sup>1</sup> Sug. V. & P. 173; *Foster v. Mac-  
kinnon*, L. R. 4 C. P. 704, and cases  
cited *infra*, § 264; *De Camp v. Hamme*,  
29 Oh. St. 467, though see *infra*, § 201.  
As to undue influence, see *supra*, § 58.

<sup>2</sup> *Greenfield Bk. v. Crafts*, 4 Allen,  
447; *Greenfield's Est.*, 14 Penn. St.  
489; *Garrett v. Gonter*, 42 Penn. St.  
143; *De Camp v. Hamme*, 29 Oh. St.  
473; see *infra*, § 1043.

<sup>3</sup> *Abbott v. Rose*, 62 Me. 194; *Chap-  
man v. Rose*, 56 N. Y. 137; and cases  
cited *Wald's Pollock*, 402. As to sig-  
natures in blank, see *infra*, § 204.

<sup>4</sup> *Vorley v. Cooke*, 1 Giff. 230; *Ogil-  
vie v. Jeaffreson*, 2 Giff. 353; *Empson's*  
case, 9 Eq. 597.

<sup>5</sup> *Hunter v. Walters*, L. R. 7 Ch. 88;  
and see remarks of Scheiff, cited *supra*,  
§ 174.

<sup>6</sup> *Forsyth v. Day*, 46 Me. 176;  
*Greenfield Bk. v. Crafts*, 4 Allen, 447;  
*Garrett v. Gonter*, 42 Penn. St. 143;  
*Union Bk. v. Middletown*, 33 Conn. 95;  
*Livingston v. Wiler*, 32 Ill. 387.

<sup>7</sup> *Hunter v. Walters*, L. R. 7 Ch. 75;  
*Halifax Union v. Wheelwright*, L. R.  
10 Ex. 192; see *infra*, § 1043.

parties, even though the blank be filled differently from what he intended.<sup>1</sup> And there is high authority to the effect that this is a doctrine of the law merchant, aside from the question of estoppel.<sup>2</sup>

3. Between the parties an unauthorized filling of a blank, not only does not bind, but amounts to a forgery. It has, in fact, been expressly ruled that where an agent has authority to fill with a particular sum a blank in a paper signed by his principal, it is forgery to fill the blank with a larger sum.<sup>3</sup> And it has also been held to be forgery to fill without authority a cheque already signed.<sup>4</sup> In cases where a forgery can impose no legal obligation, it would follow that there could be no suit between parties or privies upon a document so filled up. But a party by negligently permitting his signature to be so used may estop himself from disputing it.<sup>5</sup>

4. Where a person signs a document as party and not as attesting witness, as he intends, this is a mistake which equity will correct, although a negligent signature even of this class may impose liability as to *bona fide* third parties.<sup>6</sup>

5. A mistake made by a scrivener in engrossing a document will be so rectified by a chancellor as to make the document conform to the actual intention of the parties.<sup>7</sup>

§ 186. An essential error as to the identity of a thing which is the subject of a negotiation (error in corpore), on the same reasoning, prevents the negotiation be-

Essential  
error as to  
identity of

<sup>1</sup> Bank of Pittsburgh v. Neal, 22 How. 96, and other cases cited Wald's Pollock, 403; and see *infra*, §§ 204, 697 *et seq.*, as to filling blanks.

<sup>2</sup> Foster v. Mackinnon, L. R. 4 C. P. 704; London Bank v. Wentworth, L. R. 5 Ex. D. 96.

<sup>3</sup> R. v. Hart, 1 Mood. C. C. 486; 7 C. & P. 652; R. v. Wilson, 2 C. & K. 527; 2 Cox C. C. 426; 1 Den. C. C. 284; State v. Flanders, 38 N. H. 324; Wilson v. Commis., 70 Ill. 46; State v. Maxwell, 47 Iowa, 454; as to filling blanks, see *infra*, §§ 697 *et seq.*

<sup>4</sup> Flower v. Shaw, 2 C. & K. 703; Wright's Case, 1 Lew. C. C. 135.

<sup>5</sup> Bigelow on Est. 3d ed. 484, 485, 599; Wh. on Ev. § 1143; Bispham's Eq. § 282; Forsyth v. Day, 46 Me. 176; Stevens v. Dennett, 51 N. H. 324; Greenfield Bk. v. Crafts, 4 Allen, 447; Zuchtman v. Roberts, 109 Mass. 53; Barnard v. Campbell, 55 N. Y. 456. That a forged signature may be ratified, see Wh. on Agency, § 71.

<sup>6</sup> Bramwell, J., Wake v. Harrop, 6 H. & N. 768; Leake, 2d ed. 313.

<sup>7</sup> *Infra*, § 1205 *et seq.*; Canedy v. Marcy, 13 Gray, 373.

thing pre-  
cludes  
contract.

coming a contract. This is an established rule of the Roman law.<sup>1</sup> If A. agrees, for instance, to sell to B. one of two houses, and one of these houses is

in A.'s mind at the time, and another in B.'s mind, there is no contract between A. and B., since A. and B. had different things in mind. Or, if A. agrees to lease to B. a particular suite of rooms, but the rooms B. has in his mind are essentially different from those A. has in his mind, there is no lease, for they have not the same object in view;<sup>2</sup> and so where one party has in mind a house in a particular street, in a particular town, and another party another house in another street of the same name, in the same town;<sup>3</sup> and where there is a material mistake as to the location of a piece of land.<sup>4</sup> The same rule is applicable where one party agrees to purchase an unopened cask containing, as is alleged, a designated article, and the cask has an utterly different article in it;<sup>5</sup> and where one party has in mind cotton to leave Bombay in October, while the other party has in mind cotton to leave Bombay in December, the difference of time being material.<sup>6</sup> In fine, "where through some mistake of fact each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent."<sup>7</sup>—Of errors in identity Savigny gives the following illustrations: A testator bequeaths a particular chattel by name, he intending at the time to have given another chattel; in this case, the legacy is altogether inopera-

<sup>1</sup> *Supra*, §§ 4, 171 *et seq.*; L. 9 pr. § 1, D. decont. emt. (18, 1), L. 32, 83, § 1; L. 137, § 1, D. de verb. oblig. (45.1), L. 34, pr. D. de acquir. vel amit. possess. (41, 2).

<sup>2</sup> 1 Story, Eq. Jur. 12th ed. §§ 134 a, 144; Story on Cont. § 535; Milligan v. Cooke, 16 Ves. 1; Poole v. Shergold, 1 Cox, 731.—See discussion in Benj. on Sales, §§ 600–2.

<sup>3</sup> Kyle v. Kavanagh, 103 Mass. 356; see Barfield v. Price, 40 Cal. 535.

<sup>4</sup> Spurr v. Benedict, 99 Mass. 463; Watts v. Cummins, 59 Penn. St. 84; though see White v. Williams, 48 Barb. 222.

<sup>5</sup> Conner v. Henderson, 15 Mass. 319.

<sup>6</sup> Raffles v. Wichelhaus, 2 H. & C. 906.

<sup>7</sup> Benj. on Sales, 3d Am. ed. § 50, citing Thornton v. Kempster, 5 Taunt. 786; Calverly v. Williams, 1 Ves. Jr. 210; Keele v. Wheeler, 7 M. & G. 665; Rice v. Dwight Man. Co., 2 Cush. 80; Gardner v. Lane, 9 Allen, 499, s. c. 12 Allen, 44; Kyle v. Cavanagh, 103 Mass. 356; Harvey v. Harris, 112 Mass. 32; Sheldon v. Capron, 3 R. I. 171; see fully, cases cited, *supra*, §§ 4, 178 *et seq.*

tive.<sup>1</sup> The vendor and the purchaser, when making a bargain, have totally different chattels in mind, and in this case, there can be no sale; and the same principle applies to bargains for hiring and other bargains for transfer of goods.<sup>2</sup> Even tradition, according to Savigny, requires concurring wills, and is rendered invalid by a misunderstanding as to the identity of the thing to be transferred; and by an illusive tradition of this kind neither property nor usucapion can be acquired.<sup>3</sup>

<sup>1</sup> L. 9, § 1, de her. inst. (28, 5).

<sup>2</sup> L. 9, pr. de contr. emt. (18, 1).—  
L. 57, de O. et A. (44, 7).

<sup>3</sup> See to same effect, *Raffles v. Wichelhaus*, 2 H. & C. 906; *Calverly v. Williams*, 1 Ves. Jun. 210; *Phillips v. Bistolli*, 2 B. & C. 511; *Leake*, 2d ed. 316; *Alvanley v. Kinnaird*, 2 Mac. & G. 1. That specific performance will be refused in cases of mistake of this class, see *Malins v. Freeman*, 2 Keen, 25; *Colyer v. Clay*, 7 Beav. 188; *Jones v. Clifford*, L. R. 3 Ch. D. 779; *Holmes' App.* 77 Penn. St. 50; *Miles v. Stevens*, 3 Barr, 21; *Bruck v. Tucker*, 42 Cal. 346. In *Flight v. Booth*, 1 Bing. N. C. 376, *Tindal, C. J.* said: "With respect to misstatements which stand clear of fraud, it is impossible to remember all the cases; some of them laying it down that no misstatements, which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, 1 Camp, 340; *Wright v. Wilson*, 1 Mood. & R. 207, whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Eduey*, 3 Camp, 285; *Waring v. Hoggart*, Ry. & M. 39, and *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that *where the misdescription,*

*although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed that, but for such misdescription, the purchaser might never enter into the contract at all, in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale."*

Chancellor Kent, Com. II. 470, says: "It would seem to be sound doctrine, that a substantial error between the parties concerning the subject matter of the contract, or as to the nature of the article, or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity."

"It is an elementary principle that an agreement founded in a false conception, is a nullity in respect to the party who misconceived, because he assented to it, not absolutely, but on a condition not verified by the event. 2 Powell on Cont. 196." *Gibson, C. J., Frevall v. Fitch*, 5 Whart. 331, cited further, *infra*, § 199.

In Powell on Contracts, published in London, in 1790, long, therefore, before Savigny's great work appeared, we have the following: "An agreement may be set aside by reason of a mistake in the parties making it, if the point misconceived be the cause of the agreement; for if an agreement be entered

§ 187. An error as to the generic character of a thing bargained for in like manner prevents the inception of a contract, when the object the purchaser has in view will be absolutely defeated if the error be not made an excuse for non-performance. The intention, for instance, is to purchase a brood-mare, but by mistake a gelding is offered and accepted. Or when material of one kind (*e. g.*, gold) is bargained for, material greatly inferior, and of an utterly different character (*e. g.*, copper) is substituted. In these cases there is no contract, for there is no consent as to one and the same thing.<sup>1</sup> Hence, when a gold

And so as  
to error as  
to generic  
character  
of property

into upon the presumption by one of the parties of a fact, that is not really so as that party believes, the agreement as to him is of no force; because he did not give his assent to what is agreed upon absolutely, but upon such and such conditions; which are not verified by the event." Am. ed. of 1825, II. 122.—This is no doubt the passage referred to with approval by Gibson, C. J., in *Frevall v. Fitch*, *ut sup.*, since Mr. Powell's very words are quoted, and the authority given by Mr. Powell, is the same as that appealed to by Gibson, C. J., *viz.*, *Landsdowne v. Landsdowne*.

Savigny's chapter on error, is unquestionably, as far as Germany is concerned, "epoch making." So far, however, as regards the principle of the nullity of agreements made under an essential mistake, he is anticipated by nearly fifty years by Powell. The difference is, that the doctrine is put forth by Powell crudely and without due limitation, while by Savigny it is elaborated with extraordinary completeness and delicacy. No doubt Powell meant virtually the same thing as is meant by Savigny. But the expression, "if the point misconceived be the cause of the agreement," by itself would mislead. If "cause"

mean "material" cause,—*i. e.*, if what was meant to have been said is that if the thing obtained by the agreement is essentially unfitted for the purpose for which it was obtained, the agreement is void; then there is no difference in the main between Powell and Savigny. But the word "cause" may be read to mean "motive;" and if so, the difference is vital, since, according to Savigny (and this view is now accepted on all sides), error in motive is no ground for avoiding a contract. This, however, the context shows was not meant by Mr. Powell, and that what he intended to say was that there is no contract when there is a misconception as to an essential incident of the agreement.—It is interesting to notice that this position, which was one of the main doctrines on which Savigny's system rests, and which has since been the subject of such vehement controversy in Germany, is to be found in terms even more unreserved than those used by Savigny, in a text-book published in England in 1790.

<sup>1</sup> *Supra*, § 2; *Chandelor v. Lopus*, Cro. Jac. 4; *Gardiner v. Gray*, 4 Camp. 144; *Bridge v. Wain*, 1 Stark. 410; *Morrill v. Wallace*, 9 N. H. 113; *Gardner v. Lane*, 9 Allen, 492; *Harvey v. Harris*, 112 Mass. 32.



coin is passed away in mistake for a silver coin, there is no title to the gold coin in the party thus taking it, or in any party taking it from him by mistake.<sup>1</sup> And where A. gives a cabman a sovereign in mistake for a shilling, and the cabman, seeing that the coin is a sovereign, keeps and appropriates it, this is larceny.<sup>2</sup> Specific performance, also, has been refused in a case where the vendor innocently represented the land sold to be in one county, when it was in fact in another county.<sup>3</sup> But when the error is as to incidents which may or may not exist without changing the generic character of the thing, such error does not prevent a binding contract from being made. The parties agree as to the thing to be done or the thing to be sold. That the words in which this agreement is expressed should not exactly apply, is a necessity of all negotiations, since there are no words as to whose meaning, fully carried out, any two minds can absolutely agree. It is, in fact, an understood condition of all contracts, that while there is to be one and the same thing intended, so far as identity and substance are concerned, there is a wide margin in the way of opinion of attributes as to which parties are allowed to differ, and that each party may pursue his independent investigations as to such attributes, not disclosing to the other his conclusions.<sup>4</sup> But an error as to bulk, size, or quality, though not ordinarily invalidating a contract,<sup>5</sup> may operate, when it destroys the fitness of the thing for the purpose for which it is bought, to prevent a valid contract from being made when the purchaser is acting under such an error.<sup>6</sup> The same rule applies, *mutatis mutandis*, to all bargains. Hence, where a party supposed he was leasing "a free public house," but that which the lessor tendered was a public house which was required to take all its beer from a particular brewery, it was held that they had distinct objects in mind.<sup>7</sup>

<sup>1</sup> Chapman v. Cole, 12 Gray, 141.

<sup>2</sup> R. v. Middleton, L. R. 2 C. C. R. 38; Wh. Cr. L. 8th ed. §§ 916, 974.

<sup>3</sup> Best v. Stow, 2 Sandf. Ch. 298.

<sup>4</sup> See *infra*, §§ 217, 252, 254.

<sup>5</sup> See *infra*, § 189.

<sup>6</sup> Harris v. Pepperall, L. R. 5 Eq. 1;

Nichol v. Godts, 10 Exch. 191; Calverly v. Williams, 1 Ves. Jun. 210; Kennedy v. Panama Co., L. R. 2 Q. B. 580; see Cutts v. Guild, 57 N. Y. 229.

<sup>7</sup> Jones v. Edney, 3 Comp. 285.

§ 188. Savigny<sup>1</sup> objects to the maxim, "*Quotiens in substantia erratur, nullus est contractus*," as misleading. The cases of this supposed class, cited by the jurists, are the following: (1) Utensils of brass are bought in mistake for gold; (2) utensils of lead or other inferior metal are bought in mistake for silver; (3) vinegar is bought in mistake for wine; (4) a female is bought in mistake for a male slave. In all these cases the sale is held to be void, there being no consent, and hence no contract. In the first three cases, argues Savigny, the error concerns the stuff (*Stoff*), and this was at one time designated as *substantia*; though as convertible with *substantia* was used, and more frequently, *materia*.<sup>2</sup> But there is nothing that indicates that all errors as to the substance of a thing, or as to its material, preclude consent on the part of the party making the error. The question has to be determined by the concrete case. So far as concerns metals, it will be observed that there is a great difference in the values of the articles purchased, in the illustrations above given, from those of the articles intended to be purchased. This difference of value, however, is not decisive, since it is held that an error as to the difference between good gold and bad gold is not essential and destructive of consent, although the difference of value may be great. Had there been a legal standard of valuation it might have been different, but with no legal standard, the difference between a higher and a lower quality of gold was not regarded as essential. The true reason why, when the intention was to buy gold or silver, there was no *consensus* when the article taken was brass or lead, is in the peculiar character assigned to gold and silver. They were, as they continue to be, noble and precious metals, and no matter how much the shape in which they were moulded became marred or superannuated, their intrinsic value remained. Articles made from the inferior metals, on the other hand, depend for their value on their workmanship; when this loses its value, the value of the article is virtually gone. But the rule we thus reach

<sup>1</sup> Op. cit. § 137.

<sup>2</sup> L. 9, § 2, L. 11, pr. L. 14, de contr. emt. (18, 1).

is confined only to articles of ordinary workmanship. There may be works of art in which the stuff plays a subordinate part, and in which it is the workmanship that, from its exquisite delicacy and elaborateness, gives the value. Carving by Benvenuto Cellini, for instance, does not derive its distinctive value from the metal employed; the metal may be of no consequence, and the value of a brass vase, carved by that great artist, would be almost as great as that of a gold vase. On the other hand, articles of table use, made of silver or gold, are valued by weight. With regard to watches for ordinary personal use, Savigny holds that the difference between a gold case and a case of spurious metal is essential, although the watch itself (*i.e.*, its works) is known never to be made of gold, while the difference between gold and inferior metal in a chronometer he holds to be non-essential, since the distinctive value of the chronometer consists in the perfection of its works. But between pure metal and base metal, plated or gilt, the distinction, so the jurists hold, is essential, since of the latter, as a rule, when the form is destroyed, the value is lost.<sup>1</sup> And, on the same reasoning, gold and silver being so essentially different in value, if the intention is to buy a gold vase, and, instead, the vase received is silver gilt, there is no consent, and, therefore, no contract. But an error as to inferior metals, when bargained for domestic use, is not essential, although as between these metals there may be differences of value, since it is the shape and workmanship that give the type to such articles, the value of the material occupying a subordinate place. So far as concerns metals, therefore, although the difference between the precious and the inferior metals is decisive, it is not so as to the inferior metals when compared with each other. "Stuff," "material," or "substance," does not here afford a decisive test.—Between wine and vinegar, which the jurists speak of as essentially different, there is an unquestionable difference of stuff. But is there necessarily a difference as to value? There are some qualities of vinegar which are more costly than some qualities of wine. Here, then, it is not the difference of prices, but the utter dis-

<sup>1</sup> L. 41, § 1, de contr. emt. (18, 1).

similarity of the two things, that makes the error essential.—With regard to male and female slaves, also, the distinction, Savigny proceeds to argue, does not consist in the difference of money value, for female slaves often brought far higher prices than male. Nor in such cases could “stuff” or “material” be the test, since no Roman jurist has treated the difference of sex as a difference of *substantia* or *materia*. The test is the object of the use. The male slaves were usually employed in field labor, and as mechanics; the females in household labor and in domestic duties. The sexes, therefore, had distinct objects, and therefore an error as to sex was essential. But sex cannot be regarded as always an essential test. Among animals, the ordinary use is independent of sex, and an error as to the sex of animals—*e. g.*, horses—to be purchased, is not essential.—From these illustrations Savigny draws the following conclusion: *An error as to the quality of a thing is essential, when the quality erroneously assigned to the thing would, according to the prevailing business standard, place it in a different class to which it really belongs.* Difference in stuff is not decisive, and *error in substantia*, therefore, is not necessarily essential. He who buys wine, does not fix his mind on a mere fluid contained in a cask, but on wine specifically; and he who buys a gold vessel, fixes his mind not on the vessel, but on the gold as the material of the vessel. According to Roman phraseology, a *species* is bought, but with the tacit understanding that it belongs to a *genus*. And the same remark applies, when under the cover of the cask vinegar instead of wine is bought.—Viewed in this light, the difference between genuine and spurious jewels is essential. This is unquestionably the case with unset jewels; and it is also the case when the object of the setting is only properly to show forth the stone. It is otherwise, however, when the stone is used merely to adorn a precious vase, and is only accessory to the vase, though it may be of greater value than the vase.<sup>1</sup> With regard to animals, it is not value but kind that decides, and so between different kinds of coarse metal, and different kinds of grain.—To purchases of land the test

<sup>1</sup> L. 19, §§ 13–16, § 20, *de auro*. (34, 2).

may be readily applied. When I buy, for instance, a tract of land on which I suppose a house to be standing, but it turns out before the purchase is consummated that the house is burned down, the material basis of the sale remains the same, but in a merchantable sense its conditions are essentially altered, if my intention was to buy a house, since in this sense a house and a ruin belong to two very distinct classes. Such a contract is consequently held in the Roman law to be inoperative.<sup>1</sup> The Roman jurists, on the other hand, held that there is in this relation no essential difference between good and bad wine; between good and bad gold; between utensils of different inferior metals; between old and new clothes.<sup>2</sup> The same conclusion was reached on a bargain for the sale of wooden furniture, when a mistake was made as to the wood of which the furniture was built. Now, as Savigny proceeds to argue, price could not here be the test, for the prices of such articles vary with the wood of which they are made; it is a question of species, and it cannot be doubted that here the substance of the wood is subordinate, since by veneering and polishing there is no kind of wood that cannot be imitated. It is true that high authorities have ruled otherwise, misled in part by the abstract idea of dissimilarity of stuff, in part by the analogy with the precious metals, which analogy, however, fails in application from the fact that with furniture form is everything, and if the form is destroyed, the furniture is useless, while with the precious metals the form has little to do with the value, the silver or the gold retaining its merchantable character when melted down. But the following ruling Savigny appeals to as decisive. "*Quamvis supra diximus, cum in corpore consentiamus, de qualitate autem dissentiamus, emtionem, esse, tamen venditor; teneri debet, quanti interest (emtoris se) non esse deceptum, etsi venditor quoque nesciet; veluti si mensas quasi citreas emat, quæ non sunt.*"<sup>3</sup> In other words, a table is bought under the erroneous impression that it is of citron-wood, a material highly esteemed. This

<sup>1</sup> L. 57, 58, de contr. emt. (18, 1).<sup>3</sup> L. 21, § 2, de act. emt. (19, 1).<sup>2</sup> L. 45 de contr. emt. (18, 1); L. 11,

§ 1, de contr. emt. (18, 1).

impression we judge from the context is based on the assurance of the vendor. The contract, notwithstanding the error, is valid, but the vendor is bound to make up the difference in damages, even though the error is innocent on his part. In furniture, therefore, difference in material is unessential, so far as the present issue is concerned. The contract for the sale of the furniture was valid, though an error existed as to the wood.—As has already been stated, there are here two opposite axioms, between which, in each case, an intermediate line is to be drawn. On the one side, if there is an entire difference of opinion as to the identity of the thing bargained for, there can be no contract, since there is no assent of parties to one and the same thing; and to reject this rule would be destructive of all property, since if the rule did not exist property could be alienated without the owner's knowledge, by mere accident or mistake. On the other side, if a false description vitiates a sale, there can be no title made by sale, since there can be in no case an absolutely true description. The true meaning, as we will see more fully in the next section, is that error as to generic character prevents a contract from being matured, but not error as to quality or bulk not going to generic character, unless the incidents as to which the error took place were essential to the adaptation of the thing contracted for to its intended object.<sup>1</sup>

§ 189. Error as to quality, we may therefore hold, does not avoid a contract, unless the quality goes to the generic character of the thing which is the subject-matter of the contract, or unless it was the specific object to which the thing is to be applied.<sup>2</sup> In an English case, in 1870,<sup>3</sup> the judgment of the court, after stating "that

Nor does  
error as to  
quality.

<sup>1</sup> See *Gardner v. Lane*, 9 Allen, 492, and cases cited *infra*, §§ 189 *et seq.*

<sup>2</sup> *Scott v. Littledale*, 8 E. & B. 815; *Sutton v. Temple*, 12 M. & W. 64; *Bull v. Robinson*, 10 Exch. 342; *Gossler v. Sugar Refinery*, 103 Mass. 331; see *infra*, § 933. In *Smith v. Hughes*, L. R. 6 Q. B. 597, the difference was between old and new oats, and, on the

ground that this was not a generic difference, the case can be sustained.

In *Cox v. Prentice*, 3 M. & S. 344, there was mutual material error as to quality of silver, and the sale was set aside on that ground.

<sup>3</sup> *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 589.

if there be misapprehension as to the substance of the thing there is no contract, but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding," adds, "we apprehend the principle of our law is the same as that of the civil law; and the difficulty in every case is to determine whether the mistake or misapprehension," goes, "as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." It must be recollected that there may be many modes of classifying "*genus*" or "*substance*." A thing may be of one *genus* or substance if considered in one light, and of another *genus* or substance if considered in another light. The question is, Was it of the *genus* or substance which would fit it for the object intended? Hence it is held that where one party had in mind, in a bargain for hemp, "Riga Rhine Hemp," and the other party had in mind "St. Petersburg Clean Hemp," there was no bargain, as the vendor's kind of hemp was unfit for the purchaser's avowed purpose.<sup>1</sup> And even though there be a warranty, and no fraud, it has been held that when one party takes a view of the *differentia* of an article sold utterly different from that of the other party, there is no consent of minds.<sup>2</sup> On the other hand, the general rule is that "the existence of a separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the specific chattel at all events. Whether a particular affirmation as to the quality of a specific thing sold be only a warranty, or the sale be 'conditional, and to be null if the affirmation is incorrect,' is a question of fact to be determined by the circumstances of each case."<sup>3</sup> It should

<sup>1</sup> Thornton v. Kempster, 5 Taunt. 786.

<sup>2</sup> Marston v. Knight, 29 Me. 341; Stinson v. Walker, 21 Me. 211; Morse v. Brackett, 98 Mass. 209; Bryant v. Isburgh, 13 Gray, 607 (a horse case).

<sup>3</sup> Pollock, 3d ed. 452; citing Wightman, J., in Gurney v. Womersley, 4

E. & B. 133, and referring in general to Heyworth v. Hutchinson, L. R. 2 Q. B. 447; Azémar v. Casella, L. R. 2 C. P. 431. Mr. Wald (Wald's Pollock, 422) cites to the same effect, among other cases, Thornton v. Wynne, 12 Wheat. 183; Lyon v. Bertram, 20

at the same time be remembered that a mistake of one party, as to quality, may be ground for setting aside a contract in cases where such mistake was known at the time of the contract to the other party.<sup>1</sup>

§ 190. By the Roman law, an error as to quantity only *pro tanto* invalidates. In unilateral contracts, the Error as to quantity or price only *pro tanto* invalidates. contract, when two sums conflict, is held good for the lowest sum. If, for instance, one party offers 50, and the other accepts 30, the contract binds for only 30.<sup>2</sup>—In cases of bilateral contracts a more complex rule is applied. When the error is as to the price, no contract is effected when less is promised than is demanded, since here there was no union of wills.<sup>3</sup> But where more, under mistake, is promised than was offered, then the contract is good for the lesser sum, since as to that sum there was really an agreement of minds.<sup>4</sup> When the error relates to the thing, then there is to be a distinction between a particular thing whose quantity is designated, and the designated quantity by itself. Fifty acres of land, for instance, are sold at so much an acre, when, in fact, fifty acres cannot be given, the owner not possessing so many. Here the vendee, if the contract is not rescinded, may recover the difference in value.<sup>5</sup> And

How. 149; Day v. Pool, 52 N. Y. 416; Freeman v. Knecht, 78 Penn. St. 141; to which may be added Scranton v. Trading Co., 37 Conn. 130; Voorhees v. Earl, 2 Hill, 288; Vanleer v. Earle, 26 Penn. St. 277. In Freeman v. Knecht, *ut supra* (a horse case), it was held that, if there was fraud, the vendee might rescind.

<sup>1</sup> Leake, 2d ed. 176, 318. That a promise is to be construed in the sense in which the promisor knew it was taken by the promisee, see *infra*, § 657.

<sup>2</sup> L. 1, § 4, 5 D. de verb. ob. 45, 1.

<sup>3</sup> See Greene v. Bateman, 2 Wood. & M. 362.

<sup>4</sup> *Infra*, §§ 601, 898; L. 52, D. locate (19, 2); Brown on Sales, § 223; Story on Cont. § 540; Hart v. Mills, 15 M. & W. 85; Henkel v. Pape, L. R. 6 Ex.

7; New York Tel. Co. v. Dryburgh, 35 Penn. St. 298.

<sup>5</sup> See *infra*, §§ 898 *et seq.*; Tarbell v. Bowman, 103 Mass. 341; Wilson v. Randall, 67 N. Y. 338; Melick v. Dayton, 34 N. J. Eq. 245. Parker, J., Melick v. Dayton, 34 N. J. Eq. 249, says:—

“If a vendor *fraudulently* represents the number of acres to be greater than the actual number conveyed, and thereby induces the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement.

“Abatement will also be made where there is a *gross mistake*. Gross mistake is where the difference between the actual and the estimated quantity of land represented is so great as to clearly warrant the conclusion that the parties



when a party sells a particular farm, saying that it contains fifty acres, the contract is good for the farm, and the deficiency in quantity, if the price was adjusted to the quantity, must be accounted for by reduction of price.<sup>1</sup> When a particular measure is promised, the error can only take place in the delivery. The actual amount contracted for must be delivered, or the contract will not be properly fulfilled; and if an excess is delivered, the excess must be returned.<sup>2</sup> In our own practice, when a conveyance by mistake fails to include a part of the property bargained for, a bill for its reformation will be maintained.<sup>3</sup> But when a thing is sold in the mass, and the statement as to quantity is a mere conjectural opinion, then there can be no recovery of damages for the deficiency.<sup>4</sup> Hence, a contract for the sale of land, even though it contains a general estimate of the amount of acres in gross, will not be rescinded because the area actually passing is a little less than what the contract describes, the difference being slight and

would not have contracted had they known the truth.

“The least certain and least material parts of a description must give way to the more certain and material, and the mention of a number of acres after a certain description of the subject by metes and bounds, monuments or possession, is but matter of description, and not of the essence of the contract, and the purchaser takes the risk of quantity, where there is *no fraud* nor *gross mistake*.

“If the description calls for so many acres, ‘more or less,’ and the quantity falls short or overruns a little, no compensation is to be given either party, where there is not proof of fraud.

“Mere enumeration of quantity of land at the end of a particular description of premises by courses, distances, boundaries, and monuments, is matter of description only, and is subject to the controlling parts of the description, and if the purchaser has the distinct thing for which he contracted, the court

will not interfere, if there be a deficiency in the contents not grossly large, unless there be proof of deception by the vendor. See *Clark v. Carpenter*, 4 C. E. Gr. 328; *Couse v. Boyles*, 3 Gr. Ch. 212; *Weart v. Rose*, 1 C. E. Gr. 290; *Andrews v. Rue*, 5 Ur. 402; 4 Kent’s Com. 466; 1 Story’s Eq. Jur. § 141; *Mann v. Pearson*, 2 Johns. 37; 3 Wash. on Real Prop. (3d ed.), \*630.”

<sup>1</sup> Koch, op. cit. 139, citing L. 120, D. de verb. ob. (45, 1).

<sup>2</sup> Ibid.

<sup>3</sup> *Bispham’s Eq.* § 190; *Rand v. Webber*, 64 Me. 191; *Johnson v. Johnson*, 8 Baxt. 261. See on the several questions in the text *Kelly v. Solari*, 9 M. & W. 54; *Haven v. Foster*, 9 Pick. 129; *Watts v. Cummins*, 59 Penn. St. 84; and cases cited *infra*, §§ 898 *et seq.*

<sup>4</sup> *McLay v. Perry*, 44 L. T. N. S. 152, cited *infra*, § 215, *cf. infra*, § 902. See *McKenzie v. Hesketh*, L. R. 7 Ch. D. 675, cited *infra*, § 900. As to liability for conjectural opinion see *infra*, § 260.

unimportant;<sup>1</sup> though it is otherwise, as we have seen, when quantity is essential to the fitness of the thing sold for the object of purchase.<sup>2</sup>—When the description of an estate sold by auction, by mistake contained a much greater area than was intended by the vendor, who was guilty of no negligence, it was held that specific performance would not be compelled as to the excess thus included by mistake;<sup>3</sup> and in such case the vendee must submit to take the lesser amount or to have the contract annulled.<sup>4</sup>—As will be hereafter more fully seen, the words “about,” and “more or less,” indicate that the parties are not bound by the precise figures stated in measurement or valuation.<sup>5</sup>—Where a wrong *price* is inserted in a lumping offer for purchase or sale, specific performance will be refused,<sup>6</sup> when there is a material mistake in this respect, there being no contract, since the minds of the parties did not agree as to one and the same thing.<sup>7</sup>—But in respect to both quantity and price, it must appear that the

<sup>1</sup> *Infra*, § 902; Stebbins v. Eddy, 4 Mason, 414; Noble v. Googins, 99 Mass. 231; Mann v. Pearson, 2 Johns. 37; Morris Canal v. Emmett, 9 Paige, 168; Smith v. Evans, 6 Binn. 102; see Johnson v. Johnson, 3 Bos. & P. 170; Ladd v. Pleasants, 39 Tex. 415; Story's Eq. Jur. 12th ed. § 144.

<sup>2</sup> *Supra*, § 187; 1 Story's Eq. Jur. § 144; Farrar v. Nightingale, 2 Esp. 639; Levy v. Green, 8 E. & B. 575; 1 E. & E. 969; Milligan v. Cooke, 16 Ves. 1; Clowes v. Higginson, 1 Ves. & B. 524; Price v. North, 2 Y. & C. 620; Hart v. Mills, 5 M. & G. 85; Okill v. Whittaker, 2 Phillips, 338; Denny v. Hancock, L. R. 6 Ch. 1; Arnold v. Arnold, L. R. 14 Ch. D. 270; Irick v. Fulton, 3 Grat. 193.

<sup>3</sup> Calverly v. Williams, 1 Ves. Jun. 210; see Alvanley v. Kinnaird, 2 Mac. & G. 1.

<sup>4</sup> Harris v. Pepperell, L. R. 5 Eq. 1. “The converse case occurred in Bloomer v. Spittle, L. R. 13 Eq. 427, where a reservation was introduced by mis-

take.” Pollock, 3d ed. 445; and see McKenzie v. Hesketh, L. R. 7 Ch. D. 675; Coles v. Browne, 10 Paige, 526. “A contract of sale of an estate may be void by reason of a mistake of both parties as to the acreage, to the extent of rendering the contract in effect substantially different to that intended.” Leake, 2d ed. 341, citing Turquand v. Rhoads, 37 L. J. C. 830; Price v. North, 2 Y. & C. 620; Aberaman Works v. Wickens, L. R. 4 Ch. 101. When a vendor by mistake sells in a specified lot a larger number of acres than the lot was estimated at the time to contain, and when the price is adjusted at so much per acre, he can recover from the vendee the deficit of price. Jenks v. Fritz, 7 W. & S. 201; Fly v. Brooks, 64 Ind. 50.

<sup>5</sup> *Infra*, § 902.

<sup>6</sup> Leake, 2d ed. 316; Webster v. Cecil, 30 Beav. 62; Wycombe R. R. v. Donnington Hospital, L. R. 1 Ch. 268.

<sup>7</sup> Pollock, 3d ed. 449, citing L. 52 D. (19, 2).

party mistaking was not negligent in falling into the mistake.<sup>1</sup> Otherwise there is, if not an estoppel, an independent liability for negligence.<sup>2</sup>

§ 191. The cases that have just been stated, are those in which the error was one of mistake not induced by fraud on the part of the other bargaining party. In such case, when the thing in the mind of the one party is different from the thing in the mind of the other party, there is no consent. But another element is to be considered in case of fraud.<sup>3</sup> Where a vendor, for instance, fraudulently misstates a fact to the purchaser, it cannot be said that the parties have different things in their mind. On the contrary, each has the unreal thing in his mind; the first innocently, the second by a fictitious conception of his own. In such a state of things, not only are we not at liberty to say that there was no common contemplation of the same thing, but we must hold that the party fraudulently exhibiting the unreal thing to the other party, becomes liable for his deception to the other party. If the contract be not rescinded on application of the latter, the former may be compelled to make redress either in an action, to make up the deficiency, or in an action for deceit. In other words, the sale, as between the parties, is not void, but voidable at the purchaser's option.<sup>4</sup> On the other hand, when purchasers fraudulently obtain goods from a vendor, on an agreement which is on its face a nullity, there being no agreement of minds as to the same thing, the contract is not even voidable, so as to give title, even to *bona fide* third parties. It is true that the party defrauded may elect to hold the other party liable on the bargain, but this is not because there was a voidable contract, but because the party defrauding is estopped by his own conduct from disputing the truth of his assertion.<sup>5</sup>

If there be fraud as to quality or quantity defrauded party may hold to bargain and sue for damages.

§ 192. A settlement of accounts, founded on error, will be

<sup>1</sup> *Infra*, § 196.

<sup>2</sup> *Infra*, § 1043.

<sup>3</sup> See *infra*, § 232 *et seq.*

<sup>4</sup> *Infra*, §§ 282 *et seq.*, Pollock (Wald's ed.), 421.

<sup>5</sup> *Infra*, §§ 234 *et seq.*

Error in accounts, and as to price, may be corrected *pro tanto*.

corrected *pro tanto*;<sup>1</sup> and so of an error as to price; though, as has just been seen, when a lumping price is offered for a thing, taking it as a mass, this cannot be apportioned in cases where, while the one party had in view the whole thing, the other had in view only a part of it.<sup>2</sup>

§ 193. Error in motive is generally not so essential as to prevent a bargain which it influences from becoming a valid contract.<sup>3</sup> The Roman law recognizes an exception in cases in which a party executes a paper under the mistaken idea that he is compelled to do so; though this exception does not extend to cases in which the mistake is one of law.<sup>4</sup>—In our own law, mistake in motive does not usually avoid. “Care must be taken not to confound a common mistake as to the subject-matter of the sale, or the price, or the terms, which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact, or what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though it may be liable to be avoided for fraud, illegality, or other cause; or even though the buyer or seller may be totally mistaken in the motive which induced the assent.”<sup>5</sup>

<sup>1</sup> *Stuart v. Sears*, 119 Mass. 143; *Thibaut*, op. cit. 103; *Koch*, *ut supra*, Russell *v.* *The Church*, 65 Penn. St. 143.

<sup>2</sup> *Mounin v. Beroujon*, 51 Ala. 196; *In Jefferys v. Fairs*, L. R. 4 C. D. 448, a party agreed to take a mining lease entitling him to search for and take coal at a settled rent, he supposing that a certain vein of coal was to be found under the surface. He was held bound on his lease, though it turned out there was no such coal.

<sup>3</sup> *Harris v. Pepperell*, L. R. 5 Eq. 1; *Webster v. Cecil*, 30 Beav. 62; *supra*, §§ 190–1.

<sup>4</sup> *Bispham's Eq.* § 191; *Story's Eq. Jur.* § 150; see discussion, *supra*, § 177.

<sup>5</sup> L. 5, § 1, D. de act. emt. (19, 1); L. 3, § 7, D. de cond. causadata (12, 4); L. 51, pr. § 1, D. de pact. (11, 14); L. 31, D. pec. const. (13, 5); There was no misrepresentation charged to the lessor. For analogous cases, see *infra*, §§ 212 *et seq.*

<sup>6</sup> *Benj. on Sales*, 3d Am. ed. § 54.

§ 194. Error as to collateral matters is unessential so long as there is no error as to the thing to which such matters are collateral. As an illustration of this is given, in the Digest, a case in which it was agreed that to a farm, to be rented or sold, should be added a span of horses, among a number on the farm, but no specification was given by which the horses could be designated. By what rule was the choice of the horses to be made? According to Labeo, the intention of the vendor is in such case to prevail,<sup>1</sup> and the validity of the contract is in no way affected by the mistake of the purchaser as to the horses he was to receive.—In our system, mistake as to matters collateral which are not necessary and essential conditions of the adaptation of the thing for the intended object does not avoid.<sup>2</sup> Thus, where specific machines, ordered from the manufacturers, did not possess the qualities which the purchasers supposed they did, though without entire failure of adaptation, there being no misrepresentation or warranty by the vendor, it was held that this mistake of the purchasers was no ground for setting aside the contract.<sup>3</sup> And it has been stated, as a general rule, that “where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference.”<sup>4</sup> Even supposing the error be fraudulently promoted by the other side, this does not avoid the contract

Error as to collateral or future matters not essential.

<sup>1</sup> L. 34, pr. D. de cont. emt. (18, 1).

<sup>2</sup> Bispham's Eq. § 191; Kerr on Fraud and Mistake, 408; Chanter v. Hopkins, 4 M. & W. 399; Prideaux v. Bunnett, 1 C. B. N. S. 613; McFerran v. Taylor, 3 Cranch, 281; Henderson v. Dickey, 35 Mo. 120.

“In the case of fraud, a fraudulent representation of any fact material to the contract gives a right of rescission; but the misapprehension which prevents a valid contract from being formed must go to the root of the mat-

ter.” Pollock, 3d ed. 442, citing Kennedy v. Panama Mail Co., L. R. 2 Q. B. 580.

<sup>3</sup> Chanter v. Hopkins, 4 M. & W. 399; Ollivant v. Bayley, 5 Q. B. 288; Prideaux v. Bunnett, 1 C. B. N. S. 613; see Scott v. Littledale, 8 E. & B. 815, as criticized in Benj. on Sales, 3d Am. ed. § 57.

<sup>4</sup> Story, Eq. Jur. 12th ed. § 151, citing Okill v. Whittaker, 1 De G. & S. 83; McAninch v. Laughlin, 13 Penn. St. 371.

when the error is confined to matters collateral;<sup>1</sup> or when it is a matter of opinion.<sup>2</sup> The mistake must be as to the present, not as to the future; must be as to something immediate, not something remote.<sup>3</sup>

§ 195. In the Roman law the same distinction is applicable to contracts of exchange, an essential error making in such cases the bargain a nullity.<sup>4</sup> According to Contracts of bailment and gifts subject to the same rules. Savigny, this obtains also in contracts of hiring; a contract, for instance, for hiring silver plate being a nullity should it turn out that the plate was of inferior metal. In cases of gifts, a similar distinction is made. If the donee receives a gilt vessel which the donor believes to be golden, the gift is valid, as the donor suffers no damage from the transaction. If, on the other hand, the owner of a golden vessel gives it away under the impression that it is only gilt, then the gift is void, irrespective of the question whether the donee knew the quality of the metal.<sup>5</sup> So as to pawning. If the lender receives in pawn a gilt vessel, which the owner holds to be gold, the lender has a lien on the vessel for his advance.<sup>6</sup> This follows from the nature of unilateral contracts, as in this case the inferior security is better than no security at all.

§ 196. The ground on which the Roman jurists make essential error of fact an avoidance is that such error is sometimes inevitable; "cum facti interpretatio plerumque etiam prudentissimos fallat."<sup>7</sup> But to give this protection there must be no serious laches. It is true that perfect diligence is not required to give relief for mistake; for as there never can be in any matter perfect diligence, there could never be any relief from mistake if perfect diligence were required. *Culpa levissima*, therefore, will not preclude a party from the protection of courts of equity in cases of this kind.<sup>8</sup> It is otherwise, however, where he is chargeable with

Negligent error does not excuse.

<sup>1</sup> *Infra*, § 246.

<sup>2</sup> *Infra*, §§ 569 *et seq.*

<sup>3</sup> Southwick v. Bank, 84 N. Y. 421; *infra*, § 257.

<sup>4</sup> L. 2, de rer. per. (19, 4).

L. 22, de V. O. (25, 1).

<sup>5</sup> L. 1, § 2, de Pign. act. (13, 7).

<sup>7</sup> Cited Savigny, III. 333.

<sup>8</sup> Bispham's Eq. § 191; Bell v. Gardiner, 4 M. & G. 11; Townsend v. Crowdy, 8 C. B. (N. S.) 477; Union Nat. Bk. v. Sixth Nat. Bk., 43 N. Y.

*culpa lata, i. e.*, the lack of that diligence and care which a prudent business man of the same class is accustomed to show under similar circumstances.<sup>1</sup> Thus, a party who neglects to read a document he signs, cannot have it set aside because it turns out to contain provisions contrary to his intentions;<sup>2</sup> and, as a general rule, "where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake."<sup>3</sup> Hence, where A. made an offer to B. to take a lease of a specific farm by name, stating the farm to contain 250 acres, and where B.'s agent accepted the offer without examining the particulars, it was held that it was no defence to a proceeding to enforce the contract that B.'s agent intended to lease only 200 acres.<sup>4</sup> But where a proposal evidently contains a mistake, an acceptor, by snapping at it, will not be permitted to take advantage of the mistake.<sup>5</sup>—So far as con-

452; *Pardee v. Fish*, 60 N. Y. 271; *Mayer v. N. Y.*, 63 N. Y. 455; *Snyder v. Ives*, 42 Iowa, 162. See *infra*, §§ 245, 572, 753.

<sup>1</sup> This is settled by many rulings in the Roman law: L. 3, § 1; L. 6, L. 9, § 2, *quod falso* (27, 6); L. 11, § 11, *de inter.* (11, 1); L. 3, *pr. ad Sc. Mac.* (14, 6); L. 15, § 1, *de contr. emt.* (18, 1); L. 14, § 10, L. 55, *de ædil. ed.* (21, 1). Our own law is to the same effect: *Bispham's Eq.* § 191; *Bilbie v. Lumley*, 2 East, 469; *Milnes v. Duncan*, 6 B. & C. 671; *Beaufort v. Neeld*, 12 Cl. & F. 248; *Lenty v. Hillas*, 2 De G. & J. 110; *Ferson v. Sanger*, 1 Wood. & M. 138; *Diman v. R. R.*, 5 R. I. 130; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Paulison v. Van Iderstone*, 28 N. J. Eq. 306; *Merchants' Desp. Co. v. Theilbar*, 86 Ill. 71; *Adams Ex. Co. v. King*, 3 Ill. Ap. 316; *Lamb v. Harris*, 8 Ga. 546; *Lewis v. Lewis*, 5 Oregon, 169. See *infra*, § 572. That mere negligence does not preclude a party from recover-

ing, see *infra*, § 753, and *cf. infra*, §§ 245-572.

<sup>2</sup> *Wh. on Ev.* § 1245; *Kerr on Fraud and Mistake*, 407; *Glenn v. Statler*, 42 Iowa, 110; *Sanger v. Dun*, 47 Wis. 615; *Goetter v. Pickett*, 61 Ala. 387; *supra*, § 185. See *infra*, § 572, as to reading conditions on contracts and tickets.

<sup>3</sup> *Tamplin v. James*, L. R. 15 Ch. D. 215—*Baggallay, L. J.*

<sup>4</sup> *McKenzie v. Hesketh*, L. R. 7 Ch. D. 675.

<sup>5</sup> *Webster v. Cecil*, 30 Beav. 62. That a party is presumed to have read a document signed by him, see *Androscoggin Bk. v. Kimball*, 10 Cush. 373; *Lee v. Ins. Co.*, 3 Gray, 583; *Ryan v. Ins. Co.*, 41 Conn. 168; *Germania Ins. Co. v. R. R.*, 72 N. Y. 90; *Towner v. Lucas*, 13 Grat. 705; *Woodward v. Foster*, 18 Grat. 200; *South. Ins. Co. v. Yates*, 28 Grat. 585; *Hartford Ins. Co. v. Gray*, 80 Ill. 28. This is applied to cases of signature by mark in *Doran v. Mullen*, 78 Ill. 342; see *Wh. on Ev.* § 932. That a signature to a wrong

cerns the general questions involved, it may be stated that negligence on the part of a person paying money under a mistake of fact, is no defence to a suit to recover back the money when the negligence did not prejudice the party sued.<sup>1</sup>—It is also to be observed, that a party negligently using language that does not express his thoughts, may be estopped, as to parties *bona fide* acting on his words, from setting up his real meaning.<sup>2</sup>

§ 197. As a general rule, money paid under a mistake of fact may be recovered back;<sup>3</sup> though this rule does not apply, as we will see, to money paid in compromise, or in mistake of law.<sup>4</sup> As has just been stated and as will hereafter be more fully seen, mere negligence does not in such case preclude a party from recovery.<sup>5</sup> It is otherwise as to money paid in mistake of law.<sup>6</sup>

§ 198. Error in the view one or both parties may take of the law as bearing on the subject-matter of the proposed contract does not avoid the contract, or prevent the parties from coming to a common mind concerning it. All persons are presumed to know the law, and when this presumption relates to the public law of the land, the presumption is irrebuttable.<sup>7</sup>—Judge

Money paid under mistake may be recovered back.

Error in law does not avoid contract.

document does not bind, see *supra*, § 185.

<sup>1</sup> *U. S. v. Nat. Park Bk.*, 6 Fed. Rep. 852; *Kingston Bk. v. Ellingè*, 40 N. Y. 391; *Pardee v. Fish*, 60 N. Y. 271; *Mayer v. New York*, 63 N. Y. 455; see *Witthaus v. Shack*, 57 How. (N. Y.) Pr. 310. *Infra*, § 752.

<sup>2</sup> *Bigelow on Est.*, 3d ed. 530–44; *infra*, §§ 202 *a*, 1043 *et seq.*

<sup>3</sup> *Infra*, §§ 752 *et seq.*; and see also *infra*, § 520; *Bell v. Gardiner*, 4 M. & G. 11; *Lucas v. Worswick*, 1 Mood. & R. 293; *Pearson v. Lord*, 6 Mass. 84; *Lazell v. Miller*, 15 Mass. 208; *Waite v. Leggett*, 8 Cow. 195; *Burr v. Veeder*, 3 Wend. 412; *Mayor of N. Y. v. Erben*, 38 N. Y. 305; *Merchants' Bk. v. McIntyre*, 2 Sandf. 431, and cases cited *infra*, § 752.

<sup>4</sup> *Infra*, §§ 198 *et seq.*, 533.

<sup>5</sup> *Infra*, § 753.

<sup>6</sup> *Infra*, §§ 198, 533, 754.

<sup>7</sup> *Story's Eq. Jur.* 12th ed. § 112; *Wh. on Ev.* § 1240; *Bispham's Eq.* § 187; *Manser's case*, 2 Coke, 3 *b*; *Stewart v. Stewart*, 6 Cl. & F. 966; *Stokes v. Salomons*, 9 Hare, 79; *Clare v. Lamb*, L. R. 10 C. P. 334; *Powell v. Smith*, L. R. 14 Eq. 85; *Kelly v. Solari*, 9 M. & W. 54; *Eaglesfield v. Londonderry*, L. R. 4 Ch. D. 693; *Rogers v. Ingham*, L. R. 3 Ch. D. 351; *Hunt v. Rousmanier*, 1 Peters, 1; 8 Wheat. 174; *Bank U. S. v. Daniel*, 12 Pet. 32; *Snell v. Ins. Co.*, 98 U. S. 85; *Freeman v. Curtis*, 51 Me. 140; *Pinkham v. Gear*, 3 N. H. 163; *Mellish v. Robertson*, 25 Vt. 603; *Wheaton v. Wheaton*, 9 Conn. 96; *Shotwell v. Murray*, 1



Story<sup>1</sup> tells us that "the probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might be carried;"<sup>2</sup> and he adds that, "if, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs."<sup>3</sup> In corroboration of this view may be cited the striking remark of Pascal, that, if ignorance of law excuses, then the more ignorant a man becomes the more immunities he would possess; and that perfect brutishness, if a man could arrive at it, would invest him with perfect privilege. The only wise man, he argues, would be on this hypothesis the obstinately ignorant; the only knowledge that it would be desirable to obtain in perfection would be the knowledge not to know.<sup>4</sup>—By Mr. Austin, the reason of the rule is found in the fact "that, if ignorance of law were admitted as ground for exemption, the courts would be involved in questions which it would be scarcely possible to solve, and which would render the administration of justice next to impracticable."<sup>5</sup>—But whatever

Johns. Ch. 572; Storrs v. Barker, 6 Johns. Ch. 169; Champlin v. Laytin, 18 Wend. 407; Clarke v. Dutcher, 9 Cow. 674; Hall v. Reed, 2 Barb. Ch. 501; Hampton v. Nicholson, 8 C. E. Green, 427; Ege v. Koonts, 3 Barr, 109; Menges v. Oyster, 4 W. & S. 20; Good v. Herr, 7 W. & S. 353; McAninch v. Laughlin, 13 Penn. St. 371; Carpenter v. Jones, 44 Md. 625; Goltra v. Sanasank, 53 Ill. 456; Glenn v. Statler, 42 Iowa, 107; Lee v. Stuart, 2 Leigh, 76; McMurray v. St. Louis Co., 33 Mo. 377; Hubbard v. Martin, 8 Yerg. 498; Jones v. Watkins, 1 Stew. 81; Dill v. Shahan, 25 Ala. 694; Gwynn v. Hamilton, 29 Ala. 233; Lyon v. Sanders, 23 Miss. 530; Dailey v. Jessup, 72 Mo. 144; Smith v. Mc-

Dougal, 2 Cal. 586; Gammage v. Moore, 42 Tex. 170. That an action for money had and received does not lie in such cases, see *infra*, § 754. See generally to same effect, Elliott v. Swartwout, 10 Pet. 137; Norton v. Marden, 15 Me. 45; Hill v. Green, 4 Pick. 114; Clark v. Dutcher, 9 Cow. 674; Abell v. Douglass, 4 Denio, 305; Robinson v. Charleston, 2 Rich. 314.

<sup>1</sup> Eq. Jur. 12th ed. § 111.  
<sup>2</sup> Citing Bilbie v. Lumley, 2 East, 469.  
<sup>3</sup> Citing Lyon v. Richmond, 2 Johns. Ch. 51.  
<sup>4</sup> See 4th Prov. letter, cited at large in Wh. on Neg. § 413.  
<sup>5</sup> Aust. Lect. Jur. 3d ed. i. 498. As exceptional cases may be mentioned Jones v. Munroe, 32 Ga. 181, where it

may be the reasons of the maxim, it is a settled principle in our own as well as in all other jurisprudences. Hence money paid under mistake of law cannot be recovered back either in law or equity;<sup>1</sup> though it is otherwise as to money paid under a mistake of foreign law.<sup>2</sup> Mistake, also, as to the legal meaning of a document is no defence to an action for its enforcement.<sup>3</sup> The fact, therefore, that the legal import of a written document was differently understood by the parties, one of whom eventually turned out to have given it a wrong construction, does not avoid it, since, if it did, few valid contracts could be made.<sup>4</sup> And if the parties disagree in their

was held that ignorance, based on a decision of the State Supreme Court, afterwards overruled, was a defence; *Harney v. Charles*, 45 Mo. 157, where the plaintiff was held not to be affected by ignorance that a statute was unconstitutional which was ultimately decided to be so. Between error in fact and error in law, Savigny notices this distinction, that error in fact must be shown as a substantive fact, while error in law appears from the circumstances of the case, and can only be made excusatory on proof of facts (*e. g.*, opinions of counsel, etc.) showing that it was not the result of negligence. The two classes of error, therefore, while governed by the same substantive principle, are subject to different rules in respect to the burden of proof. And Savigny goes still further, maintaining that with errors in law, not merely the innocence but the existence of the error require a higher degree of proof than is the case with errors of fact.

<sup>1</sup> *Bispham's Eq.* § 189; *Story's Eq. Jur.* 12th ed. § 112; *Kerr on Fraud and Mistake*, 40; *Gibbons v. Caunt*, 4 Ves. 849; *Naylor v. Winch*, 1 Sim. & St. 555; *Stevens v. Lynch*, 12 East, 38; *Perrott v. Perrott*, 14 East, 429; *Stewart v. Stewart*, 6 Cl. & F. 966; *Rogers v. Ingham*, L. R. 3 Ch. D. 351;

*Eaglesfield v. Londonderry*, L. R. 4 C. D. 693; *Bank U. S. v. Daniel*, 12 Pet. 32; *Lamborn v. Commis.*, 97 U. S. 181; *Freeman v. Curtis*, 51 Me. 140; *Pinkham v. Gear*, 3 N. H. 163; *Haven v. Foster*, 9 Pick. 112; *Northrop v. Graves*, 19 Conn. 548; *Clarke v. Dutcher*, 9 Cow. 674; *Ege v. Koontz*, 3 Barr, 102; *Real Est. Inst. v. Linder*, 74 Penn. St. 371.

<sup>2</sup> *Haven v. Foster*, 9 Pick. 112; *Wh. on Ev.* § 288.

<sup>3</sup> *Story's Eq. Jur.* 12th ed. § 113; *Stockley v. Stockley*, 1 Ves. & B. 23; *Powell v. Smith*, L. R. 14 Eq. 85; *Mildmay v. Hungerford*, 7 Vern. 243; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Storrs v. Barker*, 6 Johns. Ch. 169; *Lanning v. Carpenter*, 48 N. Y. 408; *Garwood v. Eldridge*, 1 Green Ch. 145; *Moorman v. Collier*, 32 Iowa, 138; *Montgomery v. Shockey*, 37 Iowa, 107; *Martin v. Hamlin*, 18 Mich. 354. As to fraud in misstatement of legal meaning of document, see *infra*, § 259. That a party is presumed to know what he signs, see *supra*, § 196.

<sup>4</sup> *Powell v. Smith*, L. R. 14 Eq. 85; *Sawyer v. Hovey*, 3 Allen, 331; *Pitcher v. Hennessy*, 48 N. Y. 415; *Phillip v. Gallant*, 62 N. Y. 256; *Strohecker v. Farmers' Bk.*, 6 Barr, 41. See as to limitations, *infra*, § 199.

construction of the contract, in a matter not going to its essence, neither of them communicating to the other his distinctive construction, each is bound by the construction ultimately imposed upon it by the courts; although equity may relieve in cases where there was a *bona fide* non-negligent mistake of rights under an ambiguous document.<sup>1</sup> And a compromise of litigated rights, where there is no fraud, will not be subsequently disturbed by the courts, though it turn out that the right surrendered by the party subsequently complaining is valid, and is held to be so by the court to whom the appeal for the revision of the compromise is made.<sup>2</sup> The mere fact that one of the parties has misapprehended his legal rights will not by itself shake such a compromise,<sup>3</sup> though it is otherwise with a gratuitous surrender of unquestionable rights under a mistaken view of the application of the law to a par-

<sup>1</sup> *Ibid.*; *infra*, §§ 199, 654. In *Hunt v. Rousmaniere*, 8 Wheat. 174, as stated by Judge Story (Eq. Jur. 12th ed. § 114), "upon the loan of money, for which security was to be given, the parties deliberately took, after consultation with counsel, a letter of attorney, with a power to sell the property (ships) in case of non-payment of the money, instead of a mortgage upon the property itself, upon the mistake of law that the security by the former instrument would, in case of death or other accident, bind the property to the same extent as a mortgage. The debtor died, and his estate being insolvent, a bill in equity was brought by the creditor against the administrators to reform the instrument, or to give him a priority by way of lien on the property, in exclusion of the general creditors. The court finally, after the most deliberate examination of the case at three successive stages of the cause, denied relief upon the ground that the agreement was for a particular security selected by the parties, and not for security generally; and that the court were asked to substitute

another security for that selected by the parties, not upon any mistake of fact, but upon a mistake of law, when such security was not within the scope of their agreement." S. C. 1 Pet. S. C. 1, 13, 14; 2 Mason, 342; 3 Mason, 294.

<sup>2</sup> *Infra*, § 533; *Bispham's Eq.* § 189; *Kerr on Fraud and Mist.* 403; *Stewart v. Stewart*, 6 Cl. & F. 911; *Rogers v. Ingham*, L. R. 3 Ch. D. 351; *Clifton v. Cockburn*, 3 My. & K. 76; *Freeman v. Curtis*, 51 Me. 140; *Holcomb v. Stimpson*, 8 Vt. 141; *Good v. Herr*, 7 W. & S. 253; *Cumberland Co. v. Sherman*, 20 Md. 117; *Stover v. Mitchell*, 45 Ill. 213; *Trigg v. Reed*, 5 Humph. 529; *Brandon v. Medley*, 1 Jones's Eq. 313; *Durham v. Wadlington*, 2 Strob. Eq. 258; *Morris v. Munroe*, 30 Ga. 630; *Haden v. Ware*, 15 Ala. 149; *Bell v. Laurence*, 51 Ala. 160; *Beall v. McGehee*, 57 Ala. 438. That forbearance is a good consideration, see *infra*, § 532; and so of compromise of doubtful claims, *infra*, § 533; and so of giving up litigated document. *Infra*, § 534.

<sup>3</sup> *Union Bank v. Geary*, 5 Pet. 99; *infra*, § 533.

ticular state of facts.<sup>1</sup>—The whole law of compromise rests on this basis. It is greatly for the good of society that litigated questions should be amicably settled by reciprocal surrenders of rights; for not only in this way is the peace of families and of the community promoted, and business relieved from the paralysis of protracted contests, but the courts are released from a burden of litigation under which they would be crushed. Yet there are few compromises in which one of the parties at least cannot maintain that he acted in ignorance of the law. A point he considered doubtful had to be decided one way or the other; but at the time of the compromise he was ignorant of what the decision would be. If this ignorance would set aside a compromise, there is scarcely a compromise that would not be set aside.<sup>2</sup>

§ 199. It has been already noticed that error on the question, whether a particular case is subject to a particular law, is, in this relation, a question of fact, not of law. The subsumption, as the process of classification is called by the Roman jurists, may sometimes be so simple that it may be difficult to see how it could be induced by error. On the other hand, cases constantly occur which are so complicated that counsel of eminence and skill may widely differ as to the particular rule of law under which they fall. It would, so argues Savigny, be great injustice to charge those experts, whose opinion in such cases is ultimately disapproved, not only with mistake, but with negligence. He cites to this effect a remarkable ruling in the Roman law, in a case<sup>3</sup> in which eminent jurists, through various subsumptions of the facts (concerning which there was no dispute), took opposing views. Are we to hold the view which is finally discarded to be imputable to negligence? The Roman jurists did not so hold, and in the case before us,

<sup>1</sup> *Infra*, §§ 199, 533; Saxon Life Ass. Soc. *in re*, 2 J. & H. 408; McCarthy v. Decaix, 2 Rus. & M. 614; Naylor v. Winch, 1 Sim. & St. 555; Dunnage v. White, 1 Swanst. 137; Whelen's App., 70 Penn. St. 410; Jones v. Munroe, 32 Ga. 181.

<sup>2</sup> Story's Eq. Jur. 12th ed. § 131; citing Cann v. Cann, 1 P. Wil. 727; Naylor v. Winch, 1 Sim. & St. 555; Pickering v. Pickering, 2 Beav. 31; see fully *infra*, § 533.

<sup>3</sup> L. 38, de cond. indeb.

Africanus, while holding strictly to the principle that error of law is no defence where the error goes to a legal principle, maintains that it may be a defence when it goes to the question whether, in a doubtful case, a complicated system of facts falls under a particular rule.<sup>1</sup> In our own practice, this distinction, though not accepted in terms, is practically recognized. When the question is whether a particular combination of facts falls within a particular legal rule, then error in this respect may entitle a party to relief in a case where, if the question were purely one of fact, equity would interfere.<sup>2</sup> This distinction applies to the construction of documents;<sup>3</sup> and when an agreement is so framed as not to correctly express the intention of the parties, equity will not be precluded from relieving by the fact that the mistake was one of law.<sup>4</sup> Judge Story<sup>5</sup> gives as an illustration of the exception just

<sup>1</sup> Savigny, *op. cit.* 340.

<sup>2</sup> Story's *Eq.* 12th ed. §§ 138 *a et seq.*; Evans, note to 2 Peth. Obl. 395; Jones *v. Clifford*, L. R. 3 C. D. 779; Kelly *v. Solari*, 9 M. & W. 54; Cooper *v. Phibbs*, L. R. 2 H. L. C. 170; Snell *v. Ins. Co.*, 98 U. S. 85; Oliver *v. Ins. Co.*, 2 Curt. C. C. 277; Freeman *v. Curtis*, 51 Me. 140; Howard *v. Puffer*, 23 Vt. 365; McDaniels *v. Bank*, 29 Vt. 230; Warder *v. Tucker*, 7 Mass. 449; Canedy *v. Marcy*, 13 Gray, 373; Molony *v. Rourke*, 100 Mass. 190; Stockbridge Iron Co. *v. Hudson Iron Co.*, 107 Mass. 290; Northrop *v. Graves*, 19 Conn. 548; Blake-man *v. Blakeman*, 39 Conn. 320; Bank of Rochester *v. Emerson*, 10 Paige, 359; Champlain *v. Laytin*, 18 Wend. 467; Mayor of N. Y. *v. Erben*, 38 N. Y. 305; McMillan *v. Fish*, 29 N. J. Eq. 610; Logan *v. Matthews*, 6 Barr, 417; Gross *v. Leber*, 47 Penn. St. 520; Huss *v. Morris*, 63 Penn. St. 367; Russell's App., 75 Penn. St. 269; Gebb *v. Rose*, 40 Md. 387; Bigelow *v. Barr*, 4 Ohio, 358; Williams *v. Champion*, 6 Ohio, 169; McNaughton *v. Partridge*, 11 Ohio, 223; Clayton *v. Freet*, 10 Oh. St. 544; Golbia *v. Sanasack*, 53 Ill. 456; Baker

*v. Massey*, 50 Iowa, 399; Ledyard *v. Phillips*, 32 Mich. 13; Fitzgerald *v. Peck*, 4 Litt. 125; Underwood *v. Brockman*, 4 Dana, 309; Gratz *v. Redd*, 4 B. Monr. 178; Mason *v. Pelletier*, 82 N. C. 40; Garner *v. Garner*, 1 Dessaus. 437; Lowndes *v. Chisolm*, 2 McCord. Ch. 455; Hopkins *v. Mazyck*, 1 Hill, Ch. (S. C.) 242; Wyche *v. Greene*, 16 Ga. 49; Newell *v. Stiles*, 21 Ga. 118; Haden *v. Ware*, 15 Ala. 149; Larkins *v. Biddle*, 21 Ala. 252; Dailey *v. Jessup*, 72 Mo. 144; State *v. Paup*, 8 Eng. (Ark.) 129; Moreland *v. Atchison*, 19 Tex. 303; Harrell *v. De Normandie*, 26 Tex. 120.

<sup>3</sup> Kennard *v. George*, 44 N. H. 440; Molony *v. Rourke*, 100 Mass. 190; Clayton *v. Freet*, 10 Oh. St. 544. See, however, distinction taken, *supra*, § 198, *infra*, § 259.

<sup>4</sup> Oliver *v. Ins. Co.*, 2 Curt. C. C. 277; Stockbridge Iron Co. *v. Hudson Iron Co.*, 107 Mass. 290; McKay *v. Simpson*, 6 Ired. Eq. 452; *infra*, § 205.

<sup>5</sup> *Eq. Jur.* 12th ed. § 122, following Mr. Jeremy, *Eq. Juris.* pt. 2, ch. 2, p. 366; Leonard *v. Leonard*, 2 B. & B. 182.

stated, the case of an English eldest son, who is heir-at-law of his ancestor's fee simple estate, and who, in ignorance of the fact, agrees to divide with a younger brother. This agreement, it is held, would be void. Judge Story argues that the case (supposing that there was no fraud or imposition) "would exhibit such a gross mistake of rights, as would lead to the conclusion of such great mental imbecility, or surprise, or blind and credulous confidence, on the part of the eldest son, as might fairly entitle him to the protection of a court of equity upon general principles. Indeed, when the party acts upon the misapprehension that he has no title at all to the property, *it seems to involve in some measure a mistake of fact; that is, of the fact of ownership, arising from a mistake of law.* A party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant; and if he does not so intend, a court of equity will, in ordinary cases, relieve him from the legal effects of instruments which surrender such unsuspected right or title." This is virtually the position of the Roman law, that the question of the subsumption of a fact under a law is question not of law but of fact.<sup>1</sup>—

<sup>1</sup> To the same effect is 2 Pow. on Cont. 196, citing *Lansdown v. Lansdown*, Mosley, 364; 2 Jac. & W. 205. This is approved by Gibson, C. J., in *Frewall v. Fitch*, 5 Whart. 331, cited *infra*. In *Lansdown v. Lansdown*, *ut supra*, the plaintiff, who was the heir-at-law to his grandfather's estate, as eldest son to the eldest son, having differed on the question who was the heir to a deceased younger brother of the uncle, agreed to refer it to a neighbor, who was a schoolmaster, who reported that the title was in the uncle. The nephew, on this report, agreed to divide the property, which was subsequently done. Lord Chancellor King held that the land and conveyances were "obtained by mistake and misrepresentation of the law." Judge Story thinks "there is great difficulty in sustaining it (the decision) in point of

principle or authority," and he properly pronounces untenable the ground of Lord Chancellor King, that the maxim that ignorance of the law does not excuse, does not apply to civil cases. In *Hunt v. Rousmaniere*, 8 Wheat. 214, 215, the case is sought to be distinguished on the ground that the plaintiff did not know he was the eldest son, or that he was imposed upon. This meets the view of the text, though on the reasoning of Lord King, if the case can be sustained at all, it must be on the ground that the plaintiff acted under a mistake of fact as to the family priority of an eldest son over a living uncle, so far as concerns the latter's younger brother. In other words, the plaintiff may have regarded the uncle, as to junior members, the head of the family, which may be regarded as a question of fact. But

One of the learned editors of Judge Story's work on Equity Jurisprudence, argues that "the idea of there existing in this class of cases (*e. g.*, cases of mistake in the application of the law to a particular group of facts) a mistake of fact, as well as of law, might perhaps apply to all cases of mistake of law. . . . The mistake of one's title, when that depends upon a pure question of law, is a mistake of law, and nothing else." But what litigated case is there as to which we can say in advance that it depends upon a pure question of law? After the facts are settled, and the testimony in the case closed, this may be said in cases where the facts are not proved in ambiguous terms; but before the settling of the facts and the closing of the case there are always contingencies possible that may take a case out of one category of law and place it in another. Even in the case already cited, where a supposed grandson compromised a litigation with an uncle, on the supposition that the uncle, a younger brother of the grandson's father, was entitled to take as heir-at-law of a third brother deceased, the question was not a pure question of law. Who could tell, especially under marriage laws so complicated as those of England, that there might not be charged against the particular marriage under which the plaintiff claimed, some flaw that might raise a question of fact? Who can tell

*Lansdown v. Lansdown*, so far as concerns the reason given by the court, is disapproved by Lord Cottenham, in *Stewart v. Stewart*, 6 Cl. & F. 966. In *Crosier v. Acer*, 7 Paige, 143, Chancellor Walworth, in language repeated with apparent approval by Judge Story (*Eq. Jur.* 12th ed. § 126, *note*), says, after examining the cases: "If this court can relieve against a mistake in law, in any case where the defendant has been guilty of no fraud or unfair practices, which is at least very doubtful, it must be in a case in which the defendant has in reality got nothing whatever by the mistake, and where the parties can be restored substantially to the same situation in which they were at the time the mistake hap-

pened." "This," is the comment of Judge Story, "indicates a reluctance to declare that all cases of injustice, produced by the mere mistake of law, are remediless in a court of equity." And Judge Story afterwards says (*Eq. Jur.* 12th ed. § 130): "There may be a solid ground for a distinction between cases where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between parties as to their respective rights. In the former cases (as has been already suggested) the party seems to labor in some sort under a mistake of fact as well as of law."

whether there might not be a conveyance from the plaintiff which, by its own force, might raise at least a shadow of a title in some other person?<sup>1</sup> Who can say in reference to any particular litigated case, no matter how clearly it may appear to fall under some established principle, that some extraordinary casualty may not occur which will bring the case out of the range of such principle? And if so, a mistake as to whether a particular case falls within a particular rule is a mistake, which, if common to the parties, will justify the intervention of a court of equity decreeing rectification.<sup>2</sup> Mr. Pollock declares it to be "the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury,"<sup>3</sup> "that ignorance of law, means only ignorance of a *general* rule of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument."<sup>4</sup> Mr. Pollock further says:<sup>5</sup> "A. and B. make an agreement, and instruct C. to put it into legal form. C. does this so as

<sup>1</sup> Mr. Warren gives an illustration of this in the report of the famous ejectment case, in "Ten Thousand a Year," in which a deed of confirmation unexpectedly turns up, and that deed is as unexpectedly excluded on proof of an interlineation.

<sup>2</sup> "Where the officers of a public or municipal corporation act officially, and under an innocent mistake of the law, in which the other contracting party equally participated with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not in any case liable, nor is the corporation liable." Dillon Munic. Cor. § 176; adopted in *Humphrey v. Jones*, 71 Mo. 66. In *Freval v. Fitch*, 5 Whart. 332, Ch. J. Gibson said: "It is insisted, however, that a bargain can be set aside only for a misconception of fact, and not of law with which every one is bound to be acquainted. That position is disproved by *Lansdown v. Lansdown*, *Mosley*,

364; in which a deed executed on the mistaken advice of a school-master, in regard to a point of law, was set aside and the party ordered to convey. This principle is not peculiar to equity; for being of the essence of every contract, it is equally enforced at law whenever the court can look at the consideration, and when a chancellor has not exclusive jurisdiction." See *supra*, § 186. It was consequently held that where a non-negotiable note was purchased on a misrepresentation of the vendor, however innocent, as to the legal liability of the vendor, the vendor would be liable to refund the money paid in an action for money had and received.

<sup>3</sup> *Cooper v. Phibbs*, L. R. 2 H. L. p. 170; followed by *Beauchamp v. Winn*, L. R. 6 H. L. 223; *Pollock*, 3d ed. 409.

<sup>4</sup> That this is so as to construction of document, see *Wh. on Ev.* § 1241; *Kostenbader v. Spotts*, 80 Penn. St. 430; *Brent v. State*, 43 Ala. 297.

<sup>5</sup> *Pollock*, 3d ed. 421.



not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be given in either case. In neither is there any reason for holding the parties to a contract they did not really make." But in place of terms the parties selected as the expression of their views, other terms giving a different sense cannot be substituted. In other words, it may be shown that the document is not one the parties intended to execute, and the meaning of ambiguous terms may be cleared; but unambiguous terms cannot be stricken out and others substituted by parol.<sup>1</sup>—According to Mr. Leake,<sup>2</sup> "where the parties are under a common mistake of law as to the application of their contract, it can be applied only according to their intention, and not otherwise."<sup>3</sup> Hence we may hold that a promise to pay, based on a mistaken belief that certain facts fall under an acknowledged legal rule, such mistake going to the essence of the contract, is not binding.<sup>4</sup>—As a rule, it may be asserted that ignorance of a right which is a mixed question of law and fact, is to be treated as ignorance of a fact.<sup>5</sup>—The Prussian code follows the distinctions in the text. It declares that

<sup>1</sup> Wh. on Ev. §§ 920 *et seq.*; *infra*, §§ 205, 662.

<sup>2</sup> 2d ed. 347.

<sup>3</sup> Citing *Roden v. Small Arms Co.*, 46 L. J. Q. B. 213.

<sup>4</sup> *May v. Coffin*, 4 Mass. 346; *Warder v. Tucker*, 7 Mass. 452; *Freeman v. Boynton*, 7 Mass. 488; *Haven v. Foster*, 9 Pick. 112; *Molony v. Rourke*, 100 Mass. 190; and see *Stoddard v. Hart*, 23 N. Y. 556; *Lanning v. Carpenter*, 48 N. Y. 408; *Pitcher v. Hennessy*, 48 N. Y. 415; *Zollman v. Moore*, 21 Grat. 313; *Rochester v. Bank*, 13 Wis. 432.

In *Kelly v. Solari*, 9 M. & W. 54, a life insurance policy having lapsed in consequence of nonpayment of premium, and the officers of the company having, in forgetfulness of this fact, paid the insurance, it was held that the money so paid could be recovered back by the company. Here there was a mis-

taken *subsumption* of facts. And so in *McCarthy v. Decaix*, 2 Rus. & M. 614, which was the case of a foreigner, who after being divorced in Denmark from a wife he married in England, and who after the wife's death renounced, in ignorance of the law, his marital rights, it was held that this did not preclude him from coming forward in England to assert these rights as his wife's administrator.

<sup>5</sup> *Bingham v. Bingham*, 1 Ves. Sr. 126; *Broughton v. Hutt*, 3 DeG. & J. 501; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Hurd v. Hall*, 12 Wis. 112. In *Fane v. Fane*, L. R. 20 Eq. 698, a resettlement of family estates was made by the father, tenant for life, and the son, tenant in tail in remainder, the parties erroneously supposing that a charge for portions was within the power of the father to release. The resettlement was set aside, as founded on mistake.

ignorance of a published law shall be no defence; but it leaves the question open as to the subsumption of particular facts under a law ignorance of which is not set up.<sup>1</sup> It declares that *error in corpore* prevents that consent which is necessary to a contract;<sup>2</sup> but it holds that this does not apply to other cases of error, *e. g.*, errors of motive.—The French code, while apparently holding that all error avoids contracts,<sup>3</sup> virtually limits this to *error in corpore*.<sup>4</sup> Error in motive, which goes to the worth and usefulness of an article bought or hired, falls under the general head of *lesion*, and is not, to a person *capax negotii*, a defence, though when induced by fraud is ground for rescinding or for damages. Error of law is in all cases put on the same footing as error of fact.—In conclusion, we must remember that if there can be no relief for mistakes of fact involving error of law, there can be no mistake of fact for which relief can be granted, since there is no mistake of fact in which some mistake of law is not involved. A mistake as to identity of a person, for instance, involves a mistake of law as to his legal relations; a mistake as to the substance of a thing would be of no moment did it not involve a mistake as to the thing's legal incidents.<sup>5</sup> The term "law," in the rule that mistake of law is no excuse, is to be restricted to juridical law as a rule of action, and is not to be extended to law as a compound of law and fact. There are therefore two extremes, in this vexed issue, to be avoided. On the one side, when we say that mistake of law does not give ground for relief, we must restrict ourselves to such mistake of law as does not involve a mistake of fact. On the other side, when we say that mistake of fact gives ground for relief, we must remember that such mistake must go to some past or existing thing, and not relate to mere opinion of the law. When it does go to a past or existing thing, it does not cease to be ground for relief because it involves a mistake of law.

<sup>1</sup> Einl. § 12.

<sup>2</sup> L. 4, §§ 75–82.

<sup>3</sup> Art. 1109.

<sup>4</sup> Art. 1110.

<sup>5</sup> This is exhibited with much clearness in Zitelmann's treatise on *Irrthum* (Leipzig, 1879), pp. 433–602. He

shows that as errors of fact are to be regarded, (1) errors as to the nature of a transaction; (2) errors as to property though involving title; and (3) errors as to identity or incidents of persons, though these also involve legal rights.

§ 200. If a non-specialist makes a bargain with a specialist as to a topic within the range of the latter's duties, the same knowledge of the law will not be imputed to both. A lawyer, for instance, making a bargain with a client, will be chargeable with a special knowledge of the law bearing on the topic of the bargain, while the client would be chargeable with no such special knowledge; and a skilful engineer, contracting with a person ignorant of engineering, would be chargeable with a knowledge of the law bearing on engineering when no such knowledge would be imputable to the other party. So when the question comes up whether a party to a contract is liable for not knowing what it was his duty to know, his liability is measured by his duty. If he claimed to be a specialist, he should have known what a specialist of that class ought to know; if he claimed only to be a non-specialist, it was necessary for him only to have had the knowledge usual to non-specialists.<sup>1</sup> When the question of *culpa in contrahendo* arises, this distinction is of peculiar importance.<sup>2</sup>

Special knowledge not presumed in non-specialist.

§ 201. But whatever we may think as to the foregoing distinctions, it is plain that if one party avails himself of another's ignorance of law to impose upon him, the latter may invoke the aid of a court of equity for his protection.<sup>3</sup> This has been held to be the case with respect to fraudulent representations by a specialist as to the legal effect of a document.<sup>4</sup> And there is strong authority to the effect that in such case not only will a contract thus induced be rescinded by a court of equity, but that a court of law will refuse to sustain a suit on such a contract.<sup>5</sup>

Error of law when acted on fraudulently avoids.

<sup>1</sup> Wh. on Neg. §§ 414, 510, 520; 579; *Dagas v. Donaldsonville*, 33 La. Wh. on Ev. § 1241. An. 671.

<sup>2</sup> *Infra*, § 1043.

<sup>3</sup> *Infra*, §§ 232 *et seq.*; *Cooper v. Phibbs*, L. R. 2 H. L. C. 149; *Wheeler v. Smith*, 9 How. 55; *Jordon v. Stevens*, 51 Me. 78; *Freeman v. Curtis*, 51 Me. 140; *Woodbury Bank v. Ins. Co.*, 31 Conn. 517; *Whelen's App.* 70 Penn. St. 425; *Tyson v. Tyson*, 31 Md. 134; *Met. Bank v. Godfrey*, 23 Ill.

<sup>4</sup> *Edwards v. Brown*, 1 C. & J. 312; *Hirschfield v. R. R.*, L. R. 2 Q. B. D. 1; see distinction stated, *infra*, § 259.

<sup>5</sup> *Story on Cont.* § 526; 2 *Evans's Pothier on Oblig.* 409, 437; *May v. Coffin*, 4 Mass. 346; *Haven v. Foster*, 9 Pick. 112. As to signatures fraudulently induced, see *supra*, § 185.

## IV. ERROR OF EXPRESSION.

§ 202. Error of expression (error in nomine) is unessential when there is no error as to the thing referred to. This is a settled principle of the Roman law;<sup>1</sup> and the same rule is there applicable to an erroneous designation in a record.<sup>2</sup> In our own jurisprudence we have illustrations of this rule in the numerous cases in which parol evidence is admissible to solve latent ambiguities. What the parties mean is to be carried into effect, no matter what are the words they use.<sup>3</sup> Hence, while as to strangers, parol evidence is not admissible to vary documents, they are open, as between the parties,<sup>4</sup> to parol explanations.<sup>5</sup> Parol evidence, also, is admissible to show that a document was not executed, or was only conditional, or that it was conditioned on a non-performed contingency;<sup>6</sup> want of due delivery, or delivery as an escrow, as well as fraud and duress, may be proved by parol.<sup>7</sup> A designation of property may, also, when the obscurity is latent, and the error one only of expression, be corrected by parol.<sup>8</sup> The name is mutable and immaterial; it is the thing intended alone that is immutable and material, when the operation of a contract is to be considered.<sup>9</sup>

<sup>1</sup> L. 9, § 1, D. cont. emt. (18, 1), L. 475; Altschul v. San Francisco, 43 Cal. 171; and other cases cited, Wh. Cr. L. § 942.

<sup>2</sup> L. 36, 38, D. de cont. emt. (18, 1); L. 14, pr. D. de in diem addict. (18, 2); L. 46, D. loc. cond. (19, 2).

<sup>3</sup> *Supra*, §§ 174 *et seq.*; *infra*, §§ 205; 660-1; Wh. on Ev. §§ 992 *et seq.*, 942; Atty. Gen. v. Brazenose Coll., 2 Cl. & F. 295; Atty. Gen. v. Drummond, 1 Dr. & W. 353; Stockbridge Co. v. Hudson Co., 102 Mass. 48; Chester Emery Co. v. Lucas, 112 Mass. 424; Fitz v. Comey, 118 Mass. 100; Drew v. Swift, 46 N. Y. 204; Huss v. Morris, 63 Penn. St. 372; Elliott v. Harton, 28 Grat. 766; Edwards v. Tipton, 77 N. C. 222; Rigstee v. Trees, 21 Ind. 227; Talley v. Courtney, 1 Heisk. 715; Russell v. Mixer, 42 Cal.

<sup>4</sup> Wh. on Ev. §§ 920 *et seq.*; *infra*, §§ 661-2.

<sup>5</sup> Wh. on Ev. § 926.

<sup>6</sup> Wh. on Ev. §§ 927 *et seq.*

<sup>7</sup> *Infra*, § 679.

<sup>8</sup> Wh. on Ev. § 942; Atkinson v. Cummins, 9 How. 479; Glass v. Hulbert, 102 Mass. 34; Bartlett v. Gas Co., 117 Mass. 533; Gump's Appeal, 65 Penn. St. 476; Groff v. Rohrer, 35 Md. 327; Keith v. Ins. Co., 52 Ill. 518; Edwards v. Tipton, 77 N. C. 222; McPike v. Allman, 53 Mo. 551; Hathaway v. Brady, 23 Cal. 121; see *supra*, § 174.

<sup>9</sup> *Supra*, § 174. *Infra*, §§ 803-4. L. 4, pr. de leg. 1 (30 un.).

Within the same limits a designation of an individual (demonstratio) can be corrected by parol, so as to bring out the person intended in the document.<sup>1</sup> And parol evidence is admissible to show that a grantor executed a deed by other than his real name;<sup>2</sup> that persons named as beneficiaries were not those really intended;<sup>3</sup> that the real buyer or seller in a sale were not those which the memoranda indicated;<sup>4</sup> that an undisclosed principal is the real party in a transaction in which the agent is the only ostensible person;<sup>5</sup> though parol evidence is inadmissible to discharge a principal by showing that he was only agent;<sup>6</sup> and that as to third parties, one was principal and the other surety.<sup>7</sup>—Parol evidence is admissible to prove the oral terms of a contract that is partly oral and partly written;<sup>8</sup> to prove an oral extension of a contract;<sup>9</sup> to show that a conveyance in fee is in trust, or is a mortgage,<sup>10</sup> or is subject to a resulting trust;<sup>11</sup> and to explain or modify

<sup>1</sup> *Infra*, §§ 601, 661, 803-4; Wh. on Agency, §§ 291, 296; Wh. on Ev. §§ 949, 953; Mich. State Bk. v. Peck, 28 Vt. 200; Scanlan v. Wright, 13 Pick. 523; Peabody v. Brown, 10 Gray, 45; Henderson v. Hackney, 23 Ga. 383; Tuggle v. McMath, 38 Ga. 648; Westholz v. Retaud, 18 La. An. 285; Dunham v. Chatham, 21 Tex. 231.

<sup>2</sup> Nixon v. Cobleigh, 52 Ill. 387; Aultman v. Richardson, 7 Neb. 1.

<sup>3</sup> Atty. Gen. v. Drummond, 1 Dr. & W. 367; Langlois v. Crawford, 59 Mo. 456; and cases cited *infra*, § 803.

<sup>4</sup> Wh. on Agency, §§ 719 *et seq.*; Newell v. Radford, L. R. 3 C. P. 52; and *infra*, §§ 802-3 *et seq.*

<sup>5</sup> Garrett v. Handley, 4 B. & C. 664; Higgins v. Senior, 8 M. & W. 834; Fowler v. Hollins, L. R. 7 Q. B. 616; Hutton v. Bullock, L. R. 9 Q. B. 572; Nat. Ins. Co. v. Allen, 116 Mass. 398; Coleman v. Bank, 53 N. Y. 393; Oelrichs v. Ford, 21 Md. 489; Anderton v. Shoup, 17 Oh. St. 128; Ohio R. R. v. Middleton, 20 Ill. 629; and other cases cited *infra*, § 803; Wh. on Ev. § 951. In McCollin v. Gilpin, 44 L. T. 914 (1881),

an agreement between the T. Company and M. was as follows: "In consideration for the advance of the sum of 500*l.*, paid by the said M. to the said company, we the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.* . . . And we do hereby assign to the said M., as security for the said advance of 500*l.*, the machines and tools. . . . As witness our hands, this 5th day of June, 1878. (Signed) A., B., C., directors; M." The machines and tools mentioned were the property of the company. In an action by M. against A., B., and C., to recover the 500*l.*, it was held, that parol evidence was admissible to show whether it was intended that the defendants should be personally liable upon the above agreement.

<sup>6</sup> Wh. on Ev. § 951.

<sup>7</sup> *Ib.* § 952.

<sup>8</sup> *Ib.* § 1015.

<sup>9</sup> *Ib.* § 1016.

<sup>10</sup> *Ib.* §§ 1031-2.

<sup>11</sup> *Ib.* § 1035.

the statement of consideration.<sup>1</sup> Omitted words, also, will be supplied by extrinsic proof;<sup>2</sup> and relief will be granted for mistakes of scriveners.<sup>3</sup>

§ 202 a. The conclusions above stated may be sustained on the ground of estoppel. "When the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that whatever a man's real intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention."<sup>4</sup> In other words, supposing that there is no fraud or imposition, a party is estopped from denying his expressions were correct. A unilateral mistake of expression, therefore, of one party, cannot be set up by him as a ground for rescinding a contract or for resisting his enforcement, when his language was accepted by the other party in its natural sense.<sup>5</sup> But when the blunder made by the proposer is obvious, an acceptor will not be permitted, by catching it up, to take an unfair advantage. The defendant, for instance, sent a written memorandum, offering to sell certain property for 1100*l.*, he meaning to have written 1200*l.*, as appeared by a hurried calculation of items made by him on a separate piece of paper which he retained. On receiving the acceptance, he at once saw the error, and notified the other party, who knew the actual value of the property. Specific performance was refused,<sup>6</sup> and the case is subsequently stated by James, L. J., as one "where a person

<sup>1</sup> *Ib.* § 1044.

<sup>2</sup> *Daniel's Trusts in re*, L. R. 1 Ch. D. 375; *Bird's Trusts in re*, L. R. 3 Ch. D. 214; *Greenwood v. Greenwood*, L. R. 5 Ch. D. 954; *Redfern v. Bryning*, L. R. 6 Ch. D. 133; see *infra*, §§ 629 *et seq.*, 634.

<sup>3</sup> *Infra*, § 205; *Nowlin v. Pyne*, 47 Iowa, 293. As to ciphers and abbreviations, see *infra*, § 634; as to terms of art, *infra*, § 630.

<sup>4</sup> *Benj. on Sales*, 3d Am. ed. §§ 56, 780, citing *Lord Wensleydale in Free-*

*man v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, 2 Smith's L. C. 671; *Cornish v. Abington*, 4 H. & R. 549; *Van Toll v. R. R.*, 12 C. B. N. S. 75; and see *supra*, § 196; *Bigelow on Est.*, 3d ed. 530-544; and as to negligence, *infra*, §§ 1043 *et seq.*

<sup>5</sup> *Ibid.*, 2 Ch. Cont., 11th Am. ed. 1022-23; *Wh. on Ev.* §§ 1085-7; *Zuchtmann v. Roberts*, 109 Mass. 53. That false representations may be estoppels, see *infra*, § 234.

<sup>6</sup> *Webster v. Cecil*, 30 Beav. 62.

snapped at an offer which he must have perfectly well known to be made by mistake."<sup>1</sup>

§ 203. It may be, and often is, that time is inserted in a contract, not for the purpose of binding the parties to it arbitrarily and irrevocably, but in order to fix a date. In such cases it is admissible to show by parol what was the time actually intended.<sup>2</sup> And even where no such evidence is adduced, a court of equity will refuse to permit a forfeiture of rights to take place in consequence of want of punctuality of performance, but will regard a performance at a subsequent date, provided the terms be reasonable, as a fulfilment of the duty.<sup>3</sup> But it is practicable to make time the essence of a contract, in which case, if it is intentionally so fixed, it cannot be varied by parol, or its obligatory force weakened by construction.<sup>4</sup>—As will be hereafter seen, when no time is fixed for performance, a reasonable time is implied;<sup>5</sup> when a time is designated, the full limit is to be allowed;<sup>6</sup> a promisor disabling himself may make himself liable to suit before day fixed;<sup>7</sup> "forthwith" and similar terms are to be construed according to context;<sup>8</sup> a dilatory party cannot exact a forfeiture for lapse of time,<sup>9</sup> and a nominal date is presumed to be right until the contrary is proved.<sup>10</sup>

Mistake in the expression of time may be corrected.

<sup>1</sup> *Tamplin v. James*, L. R. 15 Ch. D. 221, cited *Pollock*, 3d ed. 450. And see *supra*, § 196, *infra*, § 754, to the effect that negligent error does not necessarily estop. As to fraudulent estoppel, see *infra*, § 234.

A late German commentator (Thon, *Rechtsnorm*, p. 367), in speaking of the undesigned efficacy of words, says: "It is as it is in fairy tales. Only he who knows the magical word can call the spirit. If the spirit is to be evoked, the catch-word must be uttered. But the spirit also appears to one who utters the catch-word improvidently."—I may not intend to bind myself, but bind myself I do if I utter words by which another is led to do acts to his detriment.

<sup>2</sup> *Wh. on Ev.* §§ 969, 977, 1015, 1026; *infra*, §§ 881 *et seq.*

<sup>3</sup> *Infra*, § 882; *Seton v. Slade*, 7 Ves. 265; *Lennon v. Napper*, 2 Sch. & L. 684; *Parkin v. Thorold*, 16 Beav. 59; *Taylor v. Longworth*, 14 Pet. 172; *Barnard v. Lee*, 97 Mass. 92; and other cases cited *infra*, §§ 882 *et seq.*, and *Wald's Pollock*, 444.

<sup>4</sup> *Infra*, § 887; *Seton v. Slade*, 7 Ves. 265; *Parkin v. Thorold*, 16 Beav. 59; *Taylor v. Longworth*, 14 Pet. 172.

<sup>5</sup> *Infra*, § 882.

<sup>6</sup> *Infra*, § 884.

<sup>7</sup> *Infra*, § 885 *a*; see §§ 606, 712.

<sup>8</sup> *Infra*, § 886.

<sup>9</sup> *Infra*, § 890.

<sup>10</sup> *Infra*, § 893.

§ 204. As has been elsewhere said,<sup>1</sup> a patent ambiguity may be regarded as subjective, *i. e.*, an ambiguity in the writer's own mind expressing itself imperfectly; while a latent ambiguity is objective, *i. e.*, an ambiguity in the thing described, there being several things answering to the description. So far as concerns the patent ambiguity, obvious mistakes will be corrected by the context.<sup>2</sup> Blanks may be filled in from the context,<sup>3</sup> and other formal mistakes made good.<sup>4</sup> A seal, also, erroneously attached to a partnership note, may in this way be cancelled.<sup>5</sup> But when the "words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say,"<sup>6</sup> unless it should be proved, as will next be seen, that the words in question were used by a mistake common to both sides, and that by strong and clear proof the real meaning intended by both can be brought out.<sup>7</sup>

Patent error cannot be corrected by extrinsic proof, unless mutual mistake be proved.

#### V. RECTIFICATION.

§ 205. It is a defence, as between parties with notice, that the transaction expressed has a materially different legal character from that intended. Hence, when a loan was intended, it is admissible, as between the parties to show, in the Roman law, that the words used were meant merely to express a loan, though on their face they express a gift.<sup>8</sup> With us we have innumerable cases to the effect that deeds in fee may be shown to

Bilateral error as to the nature of the transaction may be corrected.

<sup>1</sup> Wh. on Ev. § 957.

<sup>2</sup> *Wilson v. Wilson*, 5 H. L. C. 40; *De la Touche in re*, L. R. 10 Eq. 599; *Marion v. Faxon*, 20 Conn. 486. See for other cases *infra*, §§ 632-4, 661 *et seq.*

<sup>3</sup> *Langdon v. Goole*, 3 Lev. 21; *Young v. Smith*, L. R. 1 Ex. 180; *Burnside v. Wayman*, 49 Mo. 356; *Exch. Bk. v. Russell*, 50 Mo. 531. As to signing blank paper, see *supra*, § 185; as to filling blanks, see *infra*, §§ 697-700.

<sup>4</sup> *Infra*, §§ 210, 634 *et seq.*; *Brown v. Gilman*, 13 Mass. 158; *Mitchell v. Kint-*

*zer*, 5 Barr, 216; though see *Crawford v. Spencer*, 8 Cush. 418.

<sup>5</sup> *Lynam v. Califer*, 64 N. C. 572. See *infra*, §§ 634, 661 *et seq.*

<sup>6</sup> *Steph. Ev. art. 91* (citing *Shore v. Wilson*, 9 C. & F. 365); *Wh. on Ev. § 1006*; *Leake*, 2d ed. 320; *Saunderson v. Piper*, 5 Bing. N. C. 425; and *infra*, §§ 205, 634, 661.

<sup>7</sup> *Infra*, § 205.

<sup>8</sup> *Savigny, op. cit. § 136*, citing L. 3, § 1, de O. et A. (44, 7). See *Hill v. Wilson*, L. R. 8 Ch. 888.



have been merely conveyances in trust, and that even negotiable paper may be shown to be merely accommodation paper, on which a party indorsing may not be liable to an indorsee with notice.<sup>1</sup> And generally, while an essential bilateral error as to the nature of a transaction avoids a contract based on it,<sup>2</sup> a mutual error of mere verbal expression will be ground for proceedings for rectification. But to give an error as to the character of a contract the effect of thus superseding it, the error must be common to both parties. It is not want of consent that vacates, as when the parties differ as to essential features of the contract. Here the parties do not differ. They agree, but they agree to something different from what the written document expresses. And courts of equity, as between the parties, will refuse to permit a document to be enforced when there is this common mistake of expression, or will direct it, if this be asked, to be rectified.<sup>3</sup> And a mistake of fact, in signing a wrong document, may be ground for relief.<sup>4</sup>

<sup>1</sup> See Wh. on Ev. §§ 1031 *et seq.*, for cases.

<sup>2</sup> Cox v. Prentice, 3 M. & S. 344; Miles v. Stevens, 3 Barr, 21; *supra*, § 177.

<sup>3</sup> Sug. V. & P. 8th Am. ed. 262; Leake, 2d ed. 322; Kerr, Fraud and Mistake, 423; Stephens v. Ins. Co., L. R. 8 C. P. 18; Traders' Bank v. Ins. Co., 62 Me. 519; Barry v. Harris, 49 Vt. 392; Paige v. Sherman, 6 Gray, 511; Bryce v. Ins. Co., 55 N. Y. 240; Kilmer v. Smith, 77 N. Y. 226; Wheeler v. Kirtland, 23 N. J. Eq. 13; Doniol v. Ins. Co., 34 N. J. Eq. 30; Gower v. Sterner, 2 Whart. 75; Huss v. Morris, 63 Penn. St. 367; Whelen's App., 70 Penn. St. 410; Kostenbader v. Peters, 80 Penn. St. 438; McIntosh v. Saunders, 68 Ill. 128; Milmine v. Burnham, 76 Ill. 362; Keith v. Ins. Co., 52 Ill. 518; Wilson v. Hoecker, 85 Ill. 349; Merc. Ins. Co. v. Jaynes, 87 Ill. 199; Schoonover v. Dougherty, 65 Ind. 463; Trammel v. Chipman, 74 Ind. 474; Larsen v. Burke, 39 Iowa, 703; Van Dusen v. Parley, 40 Iowa, 70; Meno-

monee v. Langworthy, 18 Wis. 444; Burke v. Anderson, 40 Ga. 535; Bidwell v. Brown, 48 Ga. 179; Hall v. Hall, 43 Ala. 488; Glover v. McGilvray, 63 Ala. 508; Leggett v. Buckhalter, 30 Miss. 421; Wood v. Steamboat, 19 Mo. 529; Hook v. Craighead, 32 Mo. 405; Tesson v. Ins. Co., 40 Mo. 33; Exchange Bank v. Russell, 50 Mo. 531; Conaway v. Gore, 24 Kan. 389; Gammage v. Moore, 42 Tex. 170. That a court in a bankrupt procedure will rectify a contract and apply it on the above principles, see Boulton *in re*, L. R. 4 C. D. 241. In Rudge v. Bowman, L. R. 3 Q. B. 689, it was held that where a contract was made for the supply of goods according to a sample, which sample contained a latent defect unknown to the parties, the contract was to be construed as intended by the parties, according to the sample supposed to be sound. Leake, 2d ed. 343. See *infra*, §§ 225, 565.

<sup>4</sup> Briggs v. Ewart, 51 Mo. 249; Wright v. Macpikie, 70 Mo. 175, and cases cited *supra*, § 185.

§ 206. Hence it is settled that while a contract may be rescinded on the ground of an error of one party, induced or fraudulently taken advantage of by the other; or the fraud may be made the basis of an action for deceit; a contract based on mistake of both parties may be rectified, in our practice, by application to a court of equity.<sup>1</sup> And a construction, adopted and acted on by both parties, will be regarded as worked into the contract, and, if not conflicting with its provisions, may be proved by parol, and a definite explanation thus given to ambiguous terms.<sup>2</sup> Hence, rectification will be decreed on parol proof that the words used by the scrivener did not express the intention of the parties;<sup>3</sup> and when, through a mistake even of law,<sup>4</sup> the contract as executed fails to recite correctly the terms to which the parties had agreed.<sup>5</sup> Whether the mistake be of fact, or of the application of fact to law, if it be bilateral rectification will be ordered.<sup>6</sup> Even after an error in description of property has been carried through a series of deeds, it has been held, there being no laches, and the

<sup>1</sup> Story's Eq. Jur. 12th ed. §§ 138 *et seq.*; Bispham's Eq. § 191; Whart. on Ev. §§ 933-4, 1021; Stephens v. Ins. Co., L. R. 8 C. P. 18; Druiff v. Parker, L. R. 5 Eq. 131; Hearn v. Ins. Co., 4 Cliff. C. C. 192; Lyman v. U. S., 17 Johns. 377; Nevius v. Dunlap, 33 N. Y. 676; Baker v. Massey, 50 Iowa, 399; Michel v. Tinsley, 69 Mo. 442; and cases cited in last section.

<sup>2</sup> Wh. on Ev. § 937; Forbes v. Watt, L. R. 2 Sc. & D. 214; Chicago v. Selden, 9 Wall. 50; Atlantic R. R. v. Bank, 19 Wall. 548; Reed v. Ins. Co., 95 U. S. 23; Fenderson v. Owen, 54 Me. 374; Stone v. Clarke, 1 Met. 378; Von Keller v. Schulting, 50 N. Y. 108; Caley v. R. R., 80 Penn. St. 363; Fryer v. Patrick, 42 Md. 516; Am. Ex. Co. v. Schier, 55 Ill. 140; West. R. R. v. Smith, 75 Ill. 496; and other cases cited Wh. on Ev. §§ 937-8-9, 1021.

<sup>3</sup> Canedy v. Marey, 13 Gray, 373;

Van Donge v. Van Donge, 23 Mich. 321; Kilmer v. Smith, 77 N. Y. 226; Huss v. Morris, 63 Penn. St. 367.

<sup>4</sup> *Supra*, § 199.

<sup>5</sup> Oliver v. Ins. Co., 2 Curtis C. C. 277; Stockbridge Iron Co. v. Hudson Iron Co., 177 Mass. 290; McKay v. Simpson, 6 Ired. Eq. 452.

<sup>6</sup> *Supra*, § 198; Adams v. Stevens, 49 Me. 362; Jordan v. Stevens, 51 Me. 78; Brown v. Lamphear, 35 Vt. 252; Bruce v. Bonney, 12 Gray, 107; Woodbury Savings Bank v. Ins. Co., 31 Conn. 517; Hartford Ore. Co. v. Miller, 41 Conn. 112; McKelway v. Armour, 2 Stock. Ch. 115; Gross v. Leber, 47 Penn. St. 520; Delaware Ins. Co. v. Gillett, 54 Md. 219; Irick v. Fulton, 3 Grat. 193; Miller v. Morse, 23 Mich. 365; Gelpoke v. Blake, 15 Iowa, 387; Jack v. Naber, 15 Iowa, 450; Loomis v. Hudson, 18 Iowa, 416; Wilder v. Lee, 64 N. C. 50; Lynam v. Califer, 64 N. C. 572.

mistake being mutual, that the last vendee can obtain a decree of rectification against the original vendor.<sup>1</sup> The case for rectification is strengthened when it is made to appear that the party against whom the relief is asked, after agreeing to the omitted terms, was cognizant of their subsequent omission from the document as engrossed, and was also cognizant of the fact that the other party was ignorant of the omission.<sup>2</sup>—The rule above stated will be applied to policies of insurance in all cases in which it plainly appears that stipulations which the parties had previously agreed to were omitted in the policy.<sup>3</sup>

§ 207. So far as concerns the character of proof required, rescission and reformation are to be carefully distinguished. Rescission will be granted on proof of unilateral mistake.<sup>4</sup> Though it is open to a party in cases of bilateral mistake going to the essence of the bargain to apply for rescission, yet to sustain a decree for a rescission, it is sufficient to prove that the party complaining was *bona fide* and non-negligently mistaken on a matter so essential that the two parties in making the bargain cannot be said to have had the same

Rescission granted on proof of unilateral mistake; for rectification mistake must be bilateral.

<sup>1</sup> Blackburn v. Randolph, 33 Ark. 119.

<sup>2</sup> Welles v. Yates, 44 N. Y. 525.

<sup>3</sup> Hearn v. Ins. Co., 4 Cliff. 192; Brugger v. Ins. Co., 5 Saw. 304; Hay v. Ins. Co., 77 N. Y. 235; see Dean v. Ins. Co., 4 Cliff. 575.—“It may happen that there does exist a common intention, which, however, is founded on an assumption made by both parties, as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as non-existent. Here there is in some sense an agreement; but it is nullified in its inception by the nullity of the thing

agreed upon. And it seems hardly too artificial to say that there is no real agreement.” . . . “In the latter class of cases the error must be common to both parties.” Pollock, Wald’s ed. 400.

In England, since the recent judicature act, “the parties to any proceedings in the courts thereby established, are entitled to the administration of equitable relief; and all the divisions and judges of the court are required to give every equitable ground of relief the same effect as ought to have been given by the courts of chancery. Only all causes for the rectification, or setting aside, or cancellation of deeds or other written instruments are assigned (subject as aforesaid) to the chancery division of the court.” Leake, 2d ed. 320.

<sup>4</sup> See *infra*, § 282.

thing in mind. There can be no rectification, however, unless it is proved that both parties were mistaken in the use of the terms to be corrected, and that both parties agreed to the contract sought to be substituted for that to be set aside. In each term of the contract to be thus set up, it must be proved that the parties concurred. To a contract,<sup>1</sup> concurrence of minds is essential, and no substitution of an amended contract can be made without showing that the parties concurred in the amended contract. This is what is meant by the expression frequently used, that to justify a decree of rectification concurrent mistake, or mistake of both parties, must be proved. On proof of mistake by one party, rescission may be decreed. But rectification will not be decreed without proving that both parties had originally agreed to the terms inserted, and that the mistake was bilateral.<sup>2</sup> "The court cannot correct an instrument except upon a clear mistake common to all."<sup>3</sup>

<sup>1</sup> *Supra*, § 4.

<sup>2</sup> Story, Eq. Jur. 12th ed., § 138 *et seq.*

<sup>3</sup> Leake, 2d ed. 315, 326, citing *Sells v. Sells*, 1 Dr. & S. 42; *Bentley v. Mackay*, 31 Beav. 143; *Ionides v. Ins. Co.* L. R. 6 Q. B. 674. In the latter case, the plaintiff, intending to insure goods by one ship, by mistake insured them as if on board another ship of the same name, there being no specific identification of the goods. It was held that the insurer was not bound in respect to the goods intended to be insured, but not actually insured, though had they been otherwise sufficiently individualized, a misnomer of the ship would have been immaterial. In *MacKenzie v. Coulson*, L. R. 8 Eq. 368, rectification was also refused of an insurance policy on proof of a mere unilateral mistake; *Leake*, 2d ed. 323. In *Boulter in re*, L. R. 4 C. D. 241, the court, under proceeding in bankruptcy, held that a memorandum of mortgage in which the property was incorrectly described could be treated as if rectified so that the security could

operate as intended. To the same effect, see *Ind's case*, L. R. 7 Ch. 485; *Empson's case*, L. R. 9 Eq. 597; *Salaman v. Glover*, L. R. 20 Eq. 444; *Burchell v. Clark*, L. R. 2 C. P. D. 88; *Smith v. Iliffe*, L. R. 20 Eq. 666; Cf. 1 *White & T. L. C.* 3d ed. 36; *Sawyer v. Hovey*, 3 Allen, 331; *Canedy v. Marcy*, 13 Gray, 373; *Nevius v. Dunlap*, 33 N. Y. 676; *Bryce v. Ins. Co.*, 55 N. Y. 240; *Schettinger v. Hopple*, 3 Grant Ca. 54; *Renshaw v. Lefberman*, 51 Md. 277; *Hunter v. Bilyea*, 30 Ill. 228; *Shay v. Pettes*, 35 Ill. 360; *Nelson v. Davis*, 40 Ind. 366. That rectification cannot be granted on a mistake of only one party, see *Alvanley v. Kinnaird*, 2 Mac. & G. 1; *Swaisland v. Dearsley*, 29 Beav. 430; *Bast v. Bank*, 101 U. S. 93; *Tilley v. Cook*, 103 U. S. 155; *Brown v. Lamphear*, 35 Vt. 252; *Andrews v. Ins. Co.*, 3 Mason, 10; *Stockbridge Co. v. Hudson Co.*, 102 Mass. 48; *Nevius v. Dunlap*, 33 N. Y. 676; *Durant v. Bacot*, 13 N. J. Eq. 201; *McMillan v. Fish*, 29 N. J. Eq. 610; *Ramsey v. Smith*, 32 N. J. Eq. 28;

§ 208. To sustain a decree for the rectification of a contract (in other words, for the substitution of an amended correct contract for one containing terms held to be incorrect), the evidence must be strong and plain. Proof should be strong and plain. When parties use written, formal terms to express their intention, the inference is that these terms were properly chosen; and business would be exposed to great peril if these terms could be set aside and the tenor of the document varied by any but clear and strong proof. In England it has been held that when the defendant denies the plaintiff's allegation of mutual mistake, there should be no decree of rectification unless the plaintiff's allegation is supported, at least in part, by written proof;<sup>1</sup> and although in this country this rigid test is not applied,<sup>2</sup> yet we have numerous cases in which it is held that rectification will not be decreed unless mutual mistake be shown beyond reasonable doubt. "To substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different inten-

*Dulany v. Rogers*, 50 Md. 524; *Renshaw v. Lefferman*, 51 Md. 277; *Rounsavell v. Pease*, 45 Wis. 506; *James v. Bank*, 17 Ala. 69. In 2 Ch. on Cont., 11 Am. ed. 1024, the rule is stated to be that "a court of equity will not rectify or rescind a contract merely on the ground of a mistake of one of the parties in making it;" and to this several of the above cases are cited. But while this is correct so far as it concerns rectification, since a contract cannot be declared to be what both parties did not intend, it does not hold good as to rescission, since there is no contract if both parties did not intend the same thing. And specific performance will be refused if the parties did not intend the same thing in essence. *Supra*, § 4; *Higginson v. Clowes*, 15 Ves. 516; *Baxendale v. Seale*, 19 Beav. 601; *Spurr v. Benedict*, 99 Mass. 463; *Kyle v. Kavanagh*, 103 Mass. 356.—V., a married woman, entered into an agreement with P. to sell to him certain

property for \$4000 in gold. In drawing the deed, V.'s husband, by mistake, inserted as consideration \$4000 in currency. On the discovery of the mistake, V. sued P. to recover the difference. It was held that unless a mutual mistake should be proved, there was no ground for recovery. *Renshaw v. Lefferman*, 51 Md. 277. "If a contract should be reformed upon proof of the mistake of one of the parties as to its terms or legal effect, the injustice would be done of imposing upon the other party a contract to which he never assented." *Morton, J., German Ins. Co. v. Davis*, 131 Mass. 317.

<sup>1</sup> *Pollock*, Wald's ed. 452; *Davies v. Fitton*, 2 Dr. & War. 225; *Mortimer v. Shortall*, 2 Dr. & War. 363; but see for a less stringent rule *Murray v. Parker*, 19 Beav. 305.

<sup>2</sup> *Canedy v. Marcy*, 13 Gray, 373; *McMillan v. Fish*, 29 N. J. Eq. 610, and cases cited Wh. on Ev. §§ 1019 *et seq.*

tion, of the clearest and most satisfactory description. It is clear that a person who seeks to rectify a deed upon the ground of mistake, must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and must be able to show exactly and precisely the form to which the deed ought to be brought."<sup>1</sup> This is the settled English rule;<sup>2</sup> and such also is the rule in the United States.<sup>3</sup>—Lord Thurlow's dictum,<sup>4</sup> that the evidence must be "strong, irrefragable," is thus justly criticized by

<sup>1</sup> *Fowler v. Fowler*, 4 De G. & J. 250.

<sup>2</sup> *Pollock*, Wald's ed. 453; *Shelburne v. Inchiquin*, 1 Bro. Ch. 338; *Townshend v. Stangroom*, 6 Ves. 332.

<sup>3</sup> *Graves v. Ins. Co.*, 2 Cranch, 442; *Grymes v. Sanders*, 93 U. S. 55; *Walden v. Skinner*, 101 U. S. 577; *Brown v. Holyoke*, 53 Me. 9; *Cutler v. Smith*, 43 Vt. 577; *Sawyer v. Hovey*, 3 Allen, 331; *Glass v. Hulbert*, 102 Mass. 24; *Russell v. Barry*, 115 Mass. 300; *Blakeman v. Blakeman*, 39 Conn. 320; *Gillespie v. Moon*, 2 John. Ch. 585; *Bryce v. Ins. Co.*, 55 N. Y. 240; *Moran v. McLarty*, 75 N. Y. 25; *Whittemore v. Farrington*, 76 N. Y. 452; *Hay v. Ins. Co.*, 77 N. Y. 235; *Rowley v. Flannelly*, 30 N. J. Eq. 612; *Edmund's App.*, 59 Penn. St. 220; *Ford v. Joyce*, 78 N. Y. 618; *Kostenbader v. Peters*, 80 Penn. St. 438; *Mays v. Dwight*, 82 Penn. St. 462; *Kearney v. Sarcser*, 37 Md. 264; *McDonnell v. Milholland*, 48 Md. 540; *Weidenbusch v. Hartenstein*, 12 W. Va. 760; *Chapman v. Hurd*, 67 Ill. 234; *Wilson v. Hoecker*, 85 Ill. 349; *Peck v. Archart*, 95 Ill. 113; *Nelson v. Davis*, 40 Ind. 366; *Cain v. Hunt*, 41 Ind. 466; *New v. Wamback*, 42 Ind. 456; *Heavenridge v. Mondy*, 49 Ind. 434; *Rogers v. Odell*, 36 Mich. 411; *Van Dusen v. Parley*, 40 Iowa, 70; *Strayer v. Stone*, 47 Iowa, 333; *Hervey v. Savery*, 48 Iowa, 313; *Lake v. Meacham*, 13 Wis.

355; *Fowler v. Adams*, 13 Wis. 458; *Scott v. Webster*, 50 Wis. 53; *Lavassar v. Washburne*, 50 Wis. 200; *Yocum v. Foreman*, 14 Bush, 494; *Ferguson v. Haas*, 64 N. C. 772; *Wyche v. Green*, 11 Ga. 159; *Hamilton v. Conyers*, 28 Ga. 276; *Alston v. Wingfield*, 53 Ga. 18; *Muller v. Rhuman*, 62 Ga. 332; *Clopton v. Martin*, 11 Ala. 187; *Exchange Bk. v. Russell*, 50 Mo. 531; *Murray v. Dake*, 46 Cal. 644; *Fitz v. Bynum*, 55 Cal. 459; *Remillard v. Prescott*, 8 Oregon, 37; and cases cited *Bispham's Eq.* § 469; *Wh. on Ev.* §§ 1019 *et seq.*

In *De Jarnatt v. Cooper*, Sup. Ct. Cal. 1881, 13 Cent. L. J. 251, the rule is put as follows: "Of the jurisdiction of a court of equity to reform a mortgage, deed, or other instrument of writing, on the ground of mistake, there can be, at this day, no question. *Quivey v. Baker*, 37 Cal. 465. But to authorize the exercise of such jurisdiction, there must have been a mutual mistake as to the contents of the instrument to be reformed, or else mistake on one part and fraud upon the other. *Whittemore v. Farrington*, 76 N. Y. 452; *Paine v. Jones*, 75 Id. 593, and *Bryce v. Lorrillard Ins. Co.*, 55 Id. 240."

<sup>4</sup> *Shelburne v. Inchiquin*, 1 Bro. Ch. 347.

Judge Story:<sup>1</sup> "If by this language his lordship only meant that the mistake should be made out by evidence clear of all reasonable doubt, its accuracy need not be questioned; but if he meant that it should be in its nature or degree incapable of refutation, so as to be beyond any doubt and beyond controversy, the language is too general."<sup>2</sup> The proper test is, that the error should be proved beyond reasonable doubt.<sup>3</sup>

§ 209. When, however, a statute (*e. g.*, the statute of frauds) requires for a certain kind of contract a particular mode of proof, a contract of this character cannot, in defiance of the statute, be proved, on the pretext of amending a contract not requiring such solemnities, in a way prohibited by the statute. An oral contract, for instance, to sell goods on delivery, which need not be in writing, cannot, by rectification, be turned into a valid unwritten contract to sell goods on time, when by statute the latter kind of contract is forbidden.<sup>4</sup> This, however, does not prohibit the solving ambiguities in documents solemnized in conformity with the statute of frauds, or rectifying, under the statute, such documents in case mutual mistake of parties be clearly proved.<sup>5</sup>

Contract requiring distinct mode of proof cannot be inserted.

§ 210. A mistake that is obvious on the face of the document, will be rectified by construction by the court before whom the document is adduced. It is not necessary for this purpose that there should be a distinctive suit for rectification. The document will be read in the sense obviously intended.<sup>6</sup> Thus the omission

Obvious mistake may be rectified by context.

<sup>1</sup> Eq. Jur., 12th ed. § 157.

<sup>2</sup> See Attorney General *v.* Sitwell, 1 Y. & C. 583.

<sup>3</sup> Story, *ut supra*, citing Tucker *v.* Madden, 44 Me. 206; Shattuck *v.* Gay, 45 Vt. 87; Stockbridge Co. *v.* Hudson Co., 107 Mass. 290; Edmund's App., 59 Penn. St. 220; Coale *v.* Merryman, 35 Md. 382; Hileman *v.* Wright, 9 Ind. 126; Miner *v.* Hess, 47 Ill. 170. Whether a court of equity will decree specific performance of a rectified contract, see discussion in Story's Eq. Jur., 12th ed. § 161.

<sup>4</sup> Wh. on Ev. §§ 854, 902, 1025.

<sup>5</sup> Wh. on Ev. § 901; Boulter *in re*, L. R. 4 C. D. 241.

<sup>6</sup> Leake, 2d ed. 328; Wh. on Ev. §§ 933, 1030; Manleverer *v.* Hawxby, 2 Wens. Saund. 78; Avery *v.* White, 1 Ld. Ray. 38; Way *v.* Hearne, 13 C. B. N. S. 292; Bird's Trusts *in re*, L. R. 3 C. D. 214; Loss *v.* Obry, 22 N. J. Eq. 52; Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Barthell *v.* Roderick, 34 Iowa, 517; Exch. Bk. *v.* Russell, 50 Mo. 531; Moore *v.* Wingate, 53 Mo. 398.

to fill a blank will be thus rectified when the context supplies the data;<sup>1</sup> and a transparently erroneous substitution of one name for another will be corrected.<sup>2</sup>

§ 211. The jurisdiction of rectification, as stated in the immediately preceding sections, is exercised only as to the parties to the agreement to be rectified. He who puts his name incautiously to a document which does not express his views, while he may obtain a rectification as against the other party by putting such party in *statu quo*, cannot divest the title of *bona fide* purchasers whom his laches have misled. And even supposing no laches are imputable to him, their equity, as innocent purchasers, is equal to his.<sup>3</sup> But voluntary assignees and grantees or purchasers with notice stand in the same position as the party under whom they claim.\*

<sup>1</sup> *Supra*, §§ 204, 209; *Langdon v. Jur.* 12th ed. § 165; *Fonbl. Eq. B. 1*, Goolc, 3 *Lev.* 21; *Young v. Smith*, *Ch.* 1-87.

*L. R.* 1 *Eq.* 180; *Burnside v. Wayman*, 49 *Mis.* 356; *Exch. Bk. v. Russell*, 50 *Mo.* 551.

<sup>2</sup> *Spyve v. Topham*, 3 *East*, 115; *Wilson v. Wilson*, 5 *H. L. C.* 40; see *Brown v. Gilman*, 13 *Mass.* 158; *Richardson v. Boynton*, 12 *Allen*, 138.

<sup>3</sup> *Infra*, §§ 291, 347, 376; *Story, Eq.*

<sup>4</sup> *Ib.*, citing *Warrick v. Warrick*, 3 *Ath.* 293; *Adams v. Stevens*, 49 *Me.* 362; *White v. Wilson*, 6 *Blackf.* 448; *Burke v. Anderson*, 40 *Ga.* 535; *Stone v. Hale*, 17 *Ala.* 564; *Young v. Cason*, 48 *Mo.* 259; and cases cited *infra*, § 291.



## CHAPTER XI.

## REPRESENTATIONS AND WARRANTY.

Representations to be distinguished from conditions and warranties, § 212.	Warranty on one point excludes general implied warranty, § 220.
There must be causal relation between misrepresentation and contract, § 213.	Supplying for particular purpose implies fitness, § 221.
Contract induced by honest misapprehension may be rescinded, though no action for deceit may be maintained, § 214.	Selling meat for human food implies fitness, § 222.
Expressions of opinion not representations, § 215.	Selling by merchant implies merchantability, and by manufacturer implies that he made the goods, § 223.
Misrepresentations must have been material, and must have produced the injury, § 216.	Defects open to inspection not warranted against, § 224.
Suppression of facts does not bind unless amounting to distortion of truth, § 217.	Selling by sample implies correspondence with sample, § 225.
A condition negatives concurrence of minds; warranty assumes concurrence, but gives damages for misstatement, § 218.	Representation may be an estoppel, § 226.
Warranty need not be in any particular words, § 219.	No warranty when buyer depends on his own judgment, § 227.
	Vendor may be liable for negligence, § 228.
	Sale "with all faults" excludes warranty, § 229.
	Warranty of title implied in sale, § 230.
	To sustain such suit there must be eviction, § 231.

§ 212. WARRANTIES and conditions involve representations, but there may be representations which are neither conditions nor warranties. "With respect to statements in a contract descriptive of the subject matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a

Representations to be distinguished from conditions and warranties.

condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.”<sup>1</sup>—A representation is therefore, distinguishable from a condition in this, that while all conditions are representations, yet there may be representations which are not conditions, in which cases the untruth of the representation does not prevent the contract from taking effect, the validity of the contract not being dependent on the truth of the representation. And while all warranties involve representations, yet no representation is a warranty unless it includes an engagement that a particular thing possesses a certain material quality.<sup>2</sup>

<sup>1</sup> Williams, J., Behn v. Burness, 3 B. & S. 751.

<sup>2</sup> See more fully as to this distinction, *infra*, § 559. In Behn v. Burness, 1 B. & S. 877; 3 B. & S. 751, above cited, the action was brought upon a charter party, dated Oct. 19, 1860, which provided, that the plaintiff's ship, “then in the port of Amsterdam,” should sail from thence to Newport, and there be loaded by the defendant with coal for a voyage to the East Indies. It turned out, however, that the ship did not arrive at Amsterdam until Oct. 23d. It was held that the question of time was material; that the vessel being at Amsterdam on Oct. 23d was a condition precedent; and that on this condition not being satisfied, the defendant was not bound to load the cargo. See this case discussed in Pollock, 3d ed. 497, 505;

Anson, 133. That warranty may be implied from usage, see *infra*, § 910. In Winsor v. Lombard, 18 Pick. 60, a warranty was held to be implied in the words “sold 2000 gallons prime quality winter oil.” In this case Shaw, C. J., said: “It is now held that, without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as part of his contract, that the thing delivered corresponds to the description, and is, in fact, an article of the species, kind, and quality thus expressed in the contract of sale.” To the same effect, see *infra*, §§ 559 *et seq.*, 909, 912; notes to Chandelor v. Lopus, Smith's Lead. Cas. 7th Am. ed. 299 *et seq.*; May on Ins. §§ 181-4; Henshaw v. Robins, 9 Met. 87; Lamb v. Crafts, 12 Met. 353; Hawkins v. Pemberton, 51 N. Y. 204; Wolcott v.

§ 213. As will be hereafter more fully seen, the misrepresentation must have contributed to the loss of the party imposed upon, or it will be no ground for setting aside the contract.<sup>1</sup> It is not necessary that it should have been the *sole* cause of the contract.<sup>2</sup> If this condition was required, there could be no misrepresentation, no matter how flagrant, that would avoid a contract, since there is no contract to which other motives do not contribute beside that caused by misrepresentation of the other side. It is enough if the representation was such as to turn a judgment which might otherwise have been in equilibrium.<sup>3</sup> "It must be a representation of something as a fact upon which the purchaser relies, and by which he is induced, to some extent, to make the purchase, or is influenced in respect to the price or consideration."<sup>4</sup>—How far contributory negligence bars will be hereafter discussed in connection with fraud.<sup>5</sup> It may be here noticed that "a misleading statement or omission made by mere heedlessness or accident may deprive a vendor of his right to specific performance, even if such that a more careful buyer might not have been misled."<sup>6</sup> But a party who neglects to examine a title, cannot, on the mere ground of misrepresentation by the vendor, set aside an executed conveyance.<sup>7</sup>

There must be causal relation between the misrepresentation and the contract, to set contract aside.

§ 214. Misrepresentation is distinguishable from fraud in the fact that a misrepresentation may be innocently made by the party to whose advantage it enures, and,

Contract induced by

Mount, 7 Vroom, 262; *Borrekins v.* Bevan, 3 Rawle, 25; *Osgood v. Lewis*, 2 Har. & G. 49; *Foos v. Sabin*, 84 Ill. 564.

<sup>1</sup> *Infra*, § 242.

<sup>2</sup> That good motives are no defence, see *infra*, § 236.

<sup>3</sup> See the question of causal relations discussed in Wh. Cr. Law, 8th ed. §§ 153, 1176. That the rule of the text applies to prosecutions for obtaining goods on false pretences, see *R. v. Hewgill*, Dears. 315; *R. v. English*, 12 Coc. C. C. 171; *Com. v. Coe*, 115 Mass. 481;

*People v. Haynes*, 14 Wend. 546; *Thomas v. People*, 34 N. Y. 351.

<sup>4</sup> *McCormick v. Kelly*, Sup. Ct. Minn. 188, 24 Alb. L. J. 213, citing *Oneida Co. v. Lawrence*, 4 Cow. 440; *Adams v. Johnson*, 15 Ill. 345; *Lindsey v. Lindsey*, 34 Miss. 432; *Blythe v. Speake*, 23 Tex. 429.

<sup>5</sup> See *infra*, § 245.

<sup>6</sup> *Pollock*, 3d ed. 517, citing *Jones v. Rinmer*, L. R. 14 Ch. D. 588. See *Broad v. Munton*, L. R. 12 Ch. D. 131.

<sup>7</sup> *McCulloch v. Gregory*, 1 K. & J. 286.

honest misrepresentation may be rescinded, though no action for deceit may be maintained.

consequently, while it may invalidate the contract, does not give ground to an action *ex delicto*; whereas, a fraudulent misstatement, by stress of which a contract is obtained, not only invalidates the contract, but is the basis of an action *ex delicto*, *i. e.*, the action for deceit.<sup>1</sup> Misrepresentation is also to be distinguished from reckless misstatement. As is elsewhere shown, a party is as responsible, in an action for deceit, for a reckless misstatement of a matter of which he had no knowledge, as he would be for a deliberate statement which he knew to be false.<sup>2</sup> But the misrepresentations now before us are neither fraudulent nor reckless, but are honest misstatements, which the party making believed to be true. They do not expose him, therefore, to an action for deceit,<sup>3</sup> though they avoid a contract to which they led.<sup>4</sup> On this topic, therefore, we may hold to the following position: A contract assented to by one party on the faith of material misrepresentations by the other party, will be rescinded at the option of the party injured, although the misrepresentations were made neither fraudulently nor negligently.<sup>5</sup> But the evidence, under such

<sup>1</sup> See *infra*, § 282.

<sup>2</sup> See *infra*, § 241.

<sup>3</sup> *Collins v. Evans*, 5 Q. B. 820; *Rawlings v. Bell*, 1 C. B. 951; *Ormarod v. Huth*, 14 M. & W. 651; *Cabot v. Christie*, 42 Vt. 126; *Fisher v. Mellon*, 103 Mass. 503; *Taylor v. Leith*, 26 Oh. St. 428; *Botsford v. Wilson*, 75 Ill. 132; *Brooks v. Hamilton*, 15 Minn. 26; *Kerr on Fraud and Mist.* 54. And see to same effect *Tucker v. White*, 125 Mass. 344; *Weed v. Case*, 55 Barb. 534; *Marsh v. Falker*, 40 N. Y. 562; *Kennedy v. McKay*, 43 N. J. L. 288; *Wheeler v. Randall*, 48 Ill. 182; *Wharf v. Roberts*, 88 Ill. 426; *Dwight v. Chase*, 3 Ill. Ap. 67; *McKown v. Ferguson*, 47 Iowa, 636, and cases cited *infra*, §§ 232 *a*, 282.

<sup>4</sup> *Infra*, §§ 232 *a*, 282.

<sup>5</sup> *Infra*, §§ 279, 282, 559; *Rawle, Covenants of Title*, 573; *Bispham's*

*Eq.* § 214; *Leake on Cont.* 187; *Story's Eq.* §§ 142, 193; *Bigelow on Fraud*, 61; *Behn v. Burness*, 3 B. & S. 751; *Polhill v. Walter*, 3 B. & Ad. 114; *Denny v. Hancock*, L. R. 6 Ch. 1; *Pulsford v. Richards*, 17 Beav. 94; *Taylor v. Ashton*, 11 M. & W. 401; *Doggatt v. Emerson*, 3 Story, 733; *Warner v. Daniels*, 1 Wood. & M. 90; *Smith v. Babcock*, 2 Wood. & M. 246; *Collins v. Denison*, 12 Met. 549; *Farnam v. Brooks*, 9 Pick. 233; *Fisher v. Mellen*, 103 Mass. 503; *Rosevelt v. Fulton*, 2 Cow. 139; *Marsh v. Falker*, 40 N. Y. 562; *Best v. Stow*, 2 Sandf. Ch. 298; *Kenney v. Hoffman*, 31 Grat. 442; *Lockridge v. Foster*, 4 Scam. 569; *Allen v. Hart*, 72 Ill. 104; *Allen v. Yeater*, 17 W. Va. 128, *Converse v. Blumrich*, 14 Mich. 109; *Thomas v. McCann*, 4 B. Mon. 601; *Brooks v. Hamilton*, 15 Minn. 26; *Sledge v. Scott*, 56 Ala. 202;

circumstances, to sustain a decree for rescission, should be strong and plain.<sup>1</sup>—A concurrence of minds as to one particular thing being essential to a contract, it is admissible, therefore, for a party to show that he was misled, when he gave his assent, by the misrepresentations of the other party, and that what he assented to was, therefore, something dif-

Van Arsdale *v.* Howard, 4 Ala. 596; Munroe *v.* Pritchett, 16 Ala. 785; Lindsey *v.* Veasey, 62 Ala. 421; Parham *v.* Randolph, 4 How. Miss. 435; Buford *v.* Caldwell, 3 Mo. 477. If a vendee, for instance, is led by the vendor's representations, no matter how honest, to believe that he is buying Black-acre, when in fact he is buying White-acre, then there is no sale, since there is no concurrence of minds as to the thing sold. And whenever the misrepresentation goes to a substantial and material fact, then there is no sale. Flight *v.* Booth, 1 Bing. N. C. 370; Jones *v.* Edny, 3 Camp. 285.

In Cornfoot *v.* Fowke, 6 M. & W. 358, a majority of the court of exchequer held that a lease was not avoided by an honest misrepresentation of an agent. But this case has not been subsequently followed, and can only be sustained on the ground that the plea averred fraud, which could not be supported by proof of honest misrepresentation. See *infra*, §§ 269–79. Cornfoot *v.* Fowke is elaborately discussed in Benj. on Sales, 3d Am. ed. §§ 455, 462; and Mr. Benjamin's inclination evidently is to regard it as without authority. He cites to this effect the language of Lord St. Leonards, in Nat. Exch. Co. *v.* Drew, 2 Macq. H. L. Ca. 103; of Lord Campbell, in Wheelton *v.* Hardisty, 8 E. & B. 270; and of Willes, J., in Barwick *v.* Bank, L. R. 2 Ex. 259. To the same effect is Pollock, 3d ed. 543. See further, *infra*, §§ 270–9.

In Smith *v.* Richards, 13 Pet. 26, the complainant's bill was to rescind a contract for the purchase of a tract of land in Virginia, on which there was an alleged gold mine. The ground for rescission was misrepresentation by the vendor. The contract was rescinded, the court saying "the party selling property must be presumed to know whether the representation he makes of it is true or false, and that it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud."

<sup>1</sup> *Infra*, §§ 272, 275, 285. In King *v.* Eagle Mills, 10 Allen, 551, Bigelow, C. J., said: "There can be no doubt that a vendee may rescind a contract for the sale of chattels, and refuse to receive or accept them, if the vendor has been guilty of deceit in inducing the former to enter into the bargain. But to maintain a defence to an action for the price of goods on this ground, the same facts must be proved which would be necessary to maintain an action for damages for deceit in the sale of goods." But this position can no longer be maintained. See notes to Chandler *v.* Lopus, 1 Smith's Lead. Cas. 7th Am. ed. 299. In Grim *v.* Byrd, 32 Grat. 293, V. conveyed certain real estate to P., in consideration of shares of stock in an insolvent corporation, concerning which B. had made untrue material statements. It was held that the contract was to be rescinded; even though B. may have made the misstatements honestly.

ferent from that which the proposition on its face indicates. It is true that the terms of a contract cannot be varied by parol. But it is competent for a party to show by parol that no contract was made. It is a *petitio principii* to say that a contract, which parol cannot vary, exists between the parties, when whether a contract exists is the very question at issue.<sup>1</sup> While, therefore, an action for deceit cannot be sustained unless there be proof of fraud or reckless misstatement,<sup>2</sup> such proof is not essential to sustain an action to rescind a contract, or to defend a suit for specific performance. As was well said by Judge Story, in a case where a suit was brought to rescind a contract of this class on the ground of misrepresentation, "the question is not whether he (the defendant) acted basely and falsely, but whether the plaintiff purchased on the faith of the truth of his representations."<sup>3</sup>—It was at one time thought in England that a court of equity would not set aside an executed conveyance on the ground of misrepresentation or concealment unless there be fraud;<sup>4</sup> and it is clear that, if fraud be alleged as a ground for setting aside a transaction, fraud must be proved.<sup>5</sup> But the prevalent opinion in England now is that misrepresentation without fraud will be sufficient ground to set aside a contract induced by the misrepresentation;<sup>6</sup> and this rule was applied in a case where copyhold had been sold, apparently in good faith, as freehold.<sup>7</sup> At the same time "there may be a want of diligence on the purchaser's part, which, although not such as to deprive him of the right of rescinding the contract before completion, would preclude him from having the sale set aside after conveyance."<sup>8</sup>—The principles above stated were reaffirmed by the English Court of Appeals in December, 1881, on the following state of facts: An advertisement was

<sup>1</sup> Wh. on Ev. § 927; *Jones v. Edney*, 3 Camp. 285.

<sup>2</sup> *Infra*, § 241.

<sup>3</sup> *Doggett v. Emerson*, 3 Story, 733, see *infra*, § 282.

<sup>4</sup> Lord Campbell in *Wilde v. Gibson*, 1 H. L. C. 632; *infra*, § 282.

<sup>5</sup> S. C. 1 H. L. C. 605.

<sup>6</sup> *Haygath v. Wearing*, L. R. 12 Eq. 320; which was the case of an executed conveyance "set aside on simple misrepresentation." Pollock, 3d ed. 519.

<sup>7</sup> *Hart v. Swaine*, L. R. 7 Ch. D. 42.

<sup>8</sup> *McCulloch v. Gregory*, 1 K. & J. 286; see *infra*, § 245.

inserted in the *Law Times* by Mr. Redgrave, the plaintiff, a solicitor with a practice of 200*l.* a year, stating that he was elderly, and “of moderate practice,” contemplated retiring, had no successor, and would take a partner “who would not object to purchase advertiser’s suburban residence, value 1600*l.*” It was added “no premium required for business and introduction. A large field is here open for an efficient man.” Mr. Hurd, the defendant, another solicitor, attracted by the advertisement, entered into negotiations with the plaintiff, who stated that his business was worth 300*l.* a year, and that he had a large connection. On the defendant’s request for details, the plaintiff allowed him to inspect a bundle of papers which showed a gross business of 200*l.* a year for the last three years. The plaintiff added, in answer to other inquiries, that there was other business not entered on the papers submitted, and offered a second bundle of papers (which showed other business of 5*l.* or 6*l.* value) for the inspection of the defendant, who did not examine them, upon which the defendant agreed to purchase the house for 1600*l.*, and took possession of the house and entered on the business, which was not referred to in the written agreement.—The defendant having afterwards given up possession and refused to complete the purchase of the house, an action for specific performance was brought by the plaintiff, and the defendant counter-claimed for rescission of the agreement. It was held, on appeal (reversing the decision of Fry, J.), that the defendant did not act exclusively on the faith of the representation of the 300*l.* value, but that he did not give up his reliance on it; that, having seen the first bundle of papers, he also relied on the plaintiff’s statement as to the difference between 200*l.* and 300*l.* a year being shown by the second bundle; and that his mere negligence to inquire (even if he had the materials before him) was not sufficient to disentitle him from being relieved from the contract. No fraud was alleged in the case; the issue being misrepresentation.—“According to the decisions of courts of equity,” said Jessel, M. R., “it was not necessary, in order to set aside the contract, to prove that the person who obtained the contract, and who sought to keep it, if he obtained it by material false representation, knew at the time

the representation was made that such representation was false. It was put in two ways, either of which was to be sufficient to allow a court of equity to rescind. It was said: 'A man is not to be allowed to get a benefit from a false statement which he now admits to be false. He is not to be allowed to say for the purpose of civil jurisdiction that he did not know it to be false; he ought to have found that out before he made the representation.' That is one way of putting it, and the other way of putting it was this: 'Even assuming that you want moral fraud (this was the doctrine of common law) in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract.' That, of course, is a moral delinquency; no man ought to seek to take advantage of his own falsity. It does not matter which way it is put, but that was the rule in equity. As regards the rule of common law, there is no doubt it was not quite so wide. There were cases in which, even at common law, you could rescind a contract, although you could not show that the man knew the statement or the representation to be false. The cases are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care whether it was true or false, and not, of course, at the time with the belief that it was actually true. I think the doctrine in equity was really settled beyond controversy, and, if it were necessary to refer to the authorities, I should content myself with referring to the judgment of Lord Cairns, when Lord Justice, in the case of *Re Reese River Silver Mining Company, Smith's case*,<sup>1</sup> in which he states the doctrine of equity in the way in which I have stated it."<sup>2</sup>—But though a contract may be rescinded on the ground that it was made by one party under a mistake of facts caused by the other's misrepresentations, no action of deceit can be maintained on such misrepresentations if the

<sup>1</sup> 16 L. T. Rep. N. S. 549; L. R. 485; L. R. 20 Ch. D. 1. See for further citations, *infra*, §§ 241, 245; *cf.* Smith

<sup>2</sup> *Redgrave v. Hurd*, 45 L. T. N. S. c. Chadwick, 20 Ch. D. 27.



party making them honestly believed them to be true.<sup>1</sup> But it is otherwise if the misrepresentation was reckless or negligent. In such case an action "might be sustained upon an allegation that the representation was false, although the party making it did not know at the time he made it that it was so."<sup>2</sup>—As we will hereafter see,<sup>3</sup> though a contract may be rescinded on account of an agent's misrepresentations, no action of deceit can be maintained against the principal unless he was cognizant of the fraud.

§ 215. From representation, as will hereafter appear more fully,<sup>4</sup> are also to be distinguished expressions of opinion. There are innumerable matters as to which intelligent persons may honestly differ in opinion; and when opinions in such matters are communicated as opinion, it being open to the other party to make his own investigations, they are not to be regarded as contractual.<sup>5</sup>

Expressions of opinion not representation.

<sup>1</sup> "The fraud," said Lord Abinger, in *Moens v. Heyworth*, 10 M. & W. 155, "which vitiates a contract, and gives a party a right to recover, does not in all cases necessarily imply moral turpitude."

<sup>2</sup> Lord Abinger, *Moens v. Heyworth*, *ut supra*; *Reese Silver Co. v. Smith*, 4 Eng. Ap. 64. As to rescission in general, see *infra*, §§ 282 *et seq.* In *Childers v. Wooler*, 2 E. & E. 287, it was held that, "to support an action for false representation, the representation must not only have been false in fact, but must also have been made fraudulently." See to same effect, *Evans v. Collins*, 5 Q. B. 804; *Western Bank v. Addie*, L. R. 1 Sc. Ap. 145. That honest belief is a defence to an action based on fraud, see, further, *Benj. on Sales*, 3d Am. ed. § 429; *Lord v. Goddard*, 13 How. U. S. 198; *McDonald v. Tafton*, 15 Me. 225; *Hanson v. Edgerley*, 29 N. H. 343; *Pike v. Fay*, 101 Mass. 134; *Cooper v. Lovering*, 106 Mass. 77; *Beach v. Bemis*, 107 Mass. 498; *Binnard v. Spring*, 42 Barb.

470; *Howell v. Biddlecom*, 62 Barb. 131; *Stilt v. Little*, 63 N. Y. 427; *Boyd v. Browne*, 6 Barr. 210; *Dilworth v. Bradner*, 85 Penn. St. 238; *Merwin v. Arbuckle*, 81 Ill. 501; *St. Louis R. R. v. Rice*, 85 Ill. 406; *Bondurant v. Crawford*, 22 Iowa, 40; *Kimbell v. Moreland*, 55 Ga. 164. That reckless misstatements are to be regarded as fraudulent, see *infra*, § 241. That an action for negligence can be maintained by a party injured by a negligent erroneous assertion will appear hereafter. *Infra*, § 1043.

<sup>3</sup> *Infra*, § 279.

<sup>4</sup> *Infra*, § 259-263.

<sup>5</sup> *Anderson v. Ins. Co. L. R. 7 C. P. 65*; *Barker v. Windle*, 6 E. & B. 675; *Leaming v. Snaith*, 16 Q. B. 275; *Watts v. Cummins*, 59 Penn. St. 84; *Reed v. Sidener*, 32 Ind. 373; *Drake v. Latham*, 50 Ill. 270; *Clark v. Ralls*, 50 Iowa, 275; *McClanahan v. McKinley*, 52 Iowa, 222; *Starnes v. Erwin*, 10 Ired. 226; *Bradford v. Bush*, 10 Ala. 386; for other cases, see *infra*, §§ 249 *et seq.*; In *McLay v. Perry*, 44 L. T. N.

An erroneous statement of the law by a party not professing to be an expert, therefore, is not a misrepresentation that avoids.<sup>1</sup>—If a purchaser desires to fix liability on a vendor, for the latter's conjectural statements of opinion, a warranty should be required, or specific averments to which the vendor is notified he will be held.<sup>2</sup> And a statement by a vendor, during the negotiation for the sale of a mill and water power, that "the stream would furnish water to run the mill day and night, eight months of the year," has been held, when it turned out to be erroneous, no fraud being shown, not to entitle the vendee to damages.<sup>3</sup>

§ 216. The test laid down as to fraudulent misrepresentations, that they must be material, applies equally to honest misrepresentations.<sup>4</sup> There is this distinc-

S. 152, the plaintiffs, having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale ("about 150 tons") wrote to the defendants, "We are buyers of good wrought scrap iron, free of light and burnt iron, for our American house, and understand from Mr. S. that you have for sale about 150 tons. We can offer you 80s. per ton."—There were intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote, "We accept your offers of the 14th and 19th inst. for old iron, viz., 80s. per ton. We delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it." Before S saw the plaintiffs he had seen a heap of iron in the yard of defendants, who were builders, and said, "You seem to have about 150 tons there." The reply was, "Yes, or more." The defendants only delivered forty-four tons, that being the quantity of the heap in the yard, and the plaintiffs recovered 50*l.* damages in an action for short delivery. It was held by

Grove, J., and Lindley, J., that the words "about 150 tons," were merely words of estimate and expectation, and there was no warranty as to quantity, and therefore the defendants were not bound to deliver 150 tons; that the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in the defendant's yard.

That a mere representation of quality by seller, without fraud or warranty, will not sustain a suit, see *Ormood v. Huth*, 14 M. & W. 664; *Dickson v. Tel. Co.*, L. R. 2 C. P. D. 62; L. R. 3 C. P. D. 1. *Infra*, §§ 259–263. That a false opinion is not a false pretence, see *infra*, § 259. As to error in quantity, see *supra*, § 190; *infra*, § 898.

<sup>1</sup> *Infra*, § 264; and see also *Reed v. Sidener*, 32 Ind. 375; *Drake v. Latham*, 50 Ill. 270; nor is an erroneous statement by a non-expert of the legal effect of a document. See cases cited *infra*, § 264, and *Smither v. Calvert*, 44 Ind. 242; *Clodfatter v. Hulett*, 72 Ind. 137.

<sup>2</sup> *Todd v. Fambro*, 62 Ga. 664.

<sup>3</sup> *Clark v. Ralls*, 50 Iowa, 275.

<sup>4</sup> See *infra*, §§ 237–242; *S. P. Phipps v. Buckman*, 30 Penn. St. 401; *Weist v. Grant*, 71 Penn. St. 95.

tion, however, to be repeated, that no action for deceit lies against a person making an honest non-negligent misrepresentation, no matter how material, though such misrepresentation is ground to rescind a contract based on it; whereas when the misrepresentation is fraudulent it not only sustains a rescission, but will support an action for deceit. The injury, also, must be imputable to the misrepresentation.<sup>1</sup> And we may go a step further, and hold that an immaterial misrepresentation, honest or not honest, if not contractual, does not bind the party making it, unless by way of estoppel. If it did, few contracts could stand, since there are few contracts that do not contain surplusage, which from the imperfection of language, may not be exactly correct. But, as we have just seen, when one party assents to a proposal containing material misrepresentation of facts, the honesty with which these misrepresentations were made, while a defence to an action for deceit, are not a defence to an action to rescind the contract. And when it is a party's duty to know the truth of a particular fact, he cannot, on the ground of ignorance, defend himself on an action based on his misstatement.<sup>2</sup> Nor can a vendor hold a purchaser to a sale brought about by a material though honest misrepresentation of the vendor.<sup>3</sup>—Some conflict of opinion has arisen in England from the tendency of the courts of equity to hold that a party is bound to "make good" representations made by him in business dealings.<sup>4</sup> To adopt the language of Lord Cottenham, "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of the court for the purpose

must have been material, and must have produced the injury.

<sup>1</sup> See *supra*, § 213; *infra*, § 242 *et seq.*; and see notes to *Chandler v. Lopus*, 1 Smith's Lead. Cas. 7th Am. ed. 299 *et seq.*; *May on Ins.* § 184; *supra*, § 186; 1 Story, Eq. Jur. 12th ed. § 134 *a.* As to what facts a contracting party must disclose, see *infra*, § 250.

<sup>2</sup> *Supra*, § 214; *infra*, § 241; *Burrows v. Lock*, 10 Ves. 470; *Babcock v. Case*, 61 Penn. St. 436.

<sup>3</sup> *Spurr v. Benedict*, 99 Mass. 463; *Watts v. Cummins*, 59 Penn. St. 84; though see *White v. Williams*, 48 Barb. 222.

<sup>4</sup> See *Hammersley v. Biel*, 12 Cl. & F. 45; *Prole v. Soady*, 2 Giff. 1; *Loffus v. Maw*, 3 Giff. 592; *Coverdale v. Eastwood*, L. R. 15 Eq. 121; *Dashwood v. Jerwyn*, L. R. 12 Ch. D. 776.

of realizing such representation." But as was shown by Mr. Pollock, in 1881, in the third edition of his work on Contracts,<sup>1</sup> correcting in this respect the views taken in his second edition, these expressions were used in reference to a contract, and are based on an unquestionable contractual relation. Such was the opinion of the case expressed by Lord St. Leonards, who treated the decision as one upon a contract.<sup>2</sup> The same criticism is applicable to the rule laid down by Bacon, V C., in 1879.<sup>3</sup> "If a man makes a representation, on the faith of which another man alters his position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment, or for the continuance of the payment of an annuity, or to make a provision by will. *That in the eye of a court of equity is a contract, an engagement which the man making it is bound to perform.*" Here the passage italicized shows that it was only as an ingredient in a contract that the representation was held to be the basis of an action. And in 1880, we have an express decision by Stephen, J., that a representation, if not a term in a contract, or not operating as an estoppel, cannot form the basis of a suit.<sup>4</sup> Mr. Pollock, rightfully, as has been said, adopts this conclusion, surrendering that previously

<sup>1</sup> Pp. 494, 698.

<sup>2</sup> Maunsell v. Hedges White, 4 H. L. C. 1039.

<sup>3</sup> Dashwood v. Jerwyn, L. R. 12 Ch. D. 776.

<sup>4</sup> Alderson v. Maddison, L. R. 5 Ex. D. 293. This was a suit on a promise to make a provision by will. It was held by Stephen, J., that if the representation was not a term in a contract, it amounted to nothing. "It seems to me," he said, "that every representation, false when made or falsified by the event, must operate in one of three ways, if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation lia-

ble either to damages or to a decree that he, or his representatives, shall give effect to the representation. Secondly, it may operate as an estoppel, preventing the person making the representation from denying its truth as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence." The ruling in Alderson v. Maddison was, according to Mr. Pollock's statement (Pollock, 3d ed. 497), "reversed in C. A. April 13, 1881 (29 W. R. 556; L. R. 7 Q. B. D. 174), without discussing this question, on the ground that there was no part performance sufficient to take the case out of the statute of frauds. Thus the general principle that the transaction was a true contract or nothing is, if anything, tacitly affirmed."

expressed by him. "The true question," he says,<sup>1</sup> "is in every case, what were the terms of the contract. But this statement is subject to the qualification, that in particular classes of cases there are fixed rules as to what kind of statements shall be deemed part of the contract; and in one or two cases this rule is extended so as to make it an essential term not merely that the information given shall be true, but that all material information shall be fully, as well as truly given." The position in the last sentence, however, I do not look upon as a qualification of that in the first sentence. It is, in fact, an independent proposition; and my objection to Mr. Pollock's statement, is that he narrows to certain specified cases; *e. g.*, insurance, suretyship, sales of land, and partnership—that which, as I shall argue in the next section, is a general rule.

§ 217. The difficulties which meet us in considering the question of suppression are analogous to those which we encounter when considering the question of omission in criminal practice. It is said, and said properly, that no man can be made indictable for a mere omission; and yet, on the other hand, we meet with many cases in which what are called "omissions" are made the basis of a conviction.<sup>2</sup> Yet, when we analyze these cases, we find that they are all of them not mere abstentions of action, but that they constitute perversions of duty. A switch-tender, for instance, omits to replace a switch, and in consequence a train is wrecked; but this is not a mere omission, as would be the case if a stranger was charged with the neglect, but it is undertaking to do a particular thing and doing it wrongfully. The same distinction is applicable to omissions by telegraph officers to send telegrams, by physicians to attend patients whose care they have assumed, by parties (*e. g.*, municipal corporations) assuming the care of highways to keep such highways in order. There is, in fact, no indictable act that does not involve an omission, and no indictable omission that does not involve an act. The indictable act involves the omission, because doing the wrong thing involves

Suppression of facts does not bind unless amounting to distortion of truth.

<sup>1</sup> 3d ed. 497.

<sup>2</sup> See discussion in Wh. Cr. L. 8th ed. §§ 125 *et seq.* *Infra*, §§ 249–50.

the omission of a legal duty; the indictable omission involves an act, because omitting a legal duty involves the doing a wrong. The same rule may be laid down with regard to the suppression of truth. No man can be made liable for a mere suppression of any truth he may know, no matter how interesting or important such truth may be. Were it otherwise, life would be occupied in the delivery of interminable orations, which would leave no time even for the full acquisition of the truth which it would become the duty of each speaker to tell on the first impression. Nor is the test a mere sense of responsibility, unless the suppression amounts to a distortion of the truth. By applying this solution, we find that what are called exceptions are in fact consistent with the rule. It is said, for instance, that insurance, suretyship, sales of land, and partnership, are exceptions to the rule that suppression is not in itself actionable, no matter what may be the consequences;<sup>1</sup> and cases falling under these heads have been regarded as the greatest stumbling blocks in the way of the general recognition of the doctrine (a doctrine which seems almost a truism), that a man cannot be sued contractually on a representation that is not a term in a contract. But when we examine the suppressions in the excepted cases just noticed, it will be found that they are none of them cases of abstention from telling, amounting to mere non-action, but that they are all of them cases of perversion of telling, amounting to distortion of truth. The case is analogous to that of a man employed on a railroad to signalize the approach of a train. He stands at his place of observation, and is to make or cause certain action to designate danger. He continues to stand at his post, but does not make the motion necessary to indicate the approach of danger. This is not omission or suppression, but perversion of truth. So it is with what are called the excepted cases, in which a supposed bare suppression becomes the foundation of a contractual suit.<sup>2</sup>

<sup>1</sup> See Pollock, 3d ed. 500 *et seq.*

<sup>2</sup> That withholding a fact when such withholding makes the attitude of the party holding amount to a negation, is a misrepresentation, see *Keates v. Cadogan*, 10 C. B. 591, where Jervis,

C. J., said: "Not removing that delusion (a material mistake which the negotiations showed the purchaser was under), might be taken as equivalent to an express representation." For other cases, see *infra*, §§ 249, 250. See

The most conspicuous of these is that of an applicant for insurance. He is to make signs, as it were, to indicate certain conditions; if he has certain maladies, he is to tell; not telling is equivalent to saying he has not these maladies.<sup>1</sup> So it is with regard to suretyship. I ask another person to go surety for me, and my attitude to him is that of the insured to the insurer; non-disclosure of my insolvency, for instance, is equivalent to an assertion of solvency. Of family negotiations, also, the same remarks may be made; in negotiations of this class, candor and fulness of explanation are so far required that an omission by a brother, for instance, to state a fact to a brother that the former knows to be important, and knows would be considered important by the latter, is equivalent to a statement that the fact does not exist;<sup>2</sup> and the same observation may be made as to partnership.<sup>3</sup> So far as concerns sales of land, the position taken by Mr. Pollock hardly authorizes transactions of this class to be regarded, at least in this country, as different in this respect from sales of personal property. He tells us<sup>4</sup> that "a misdescription, materially affecting the value, title, or character of the property sold, will make the contract voidable at the purchaser's option, and this notwithstanding special conditions of sale providing that errors of description shall be matters for compensation only."<sup>5</sup> It is further alleged that, "on sales of real property, it is

generally *Attwood v. Small*, 6 Cl. & F. 232; *Evans v. Edmonds*, 13 C. B. 777; *Horstall v. Thomas*, 1 H. & C. 90; *Prentiss v. Russ*, 16 Me. 30; *Paddock v. Strobbridge*, 29 Vt. 470; *Matthews v. Bliss*, 22 Pick. 48; *Otis v. Raymond*, 3 Conn. 413; *Cogel v. Kniseley*, 89 Ill. 598; *Van Arsdale v. Howard*, 5 Ala. 596; *Herring v. Skaggs*, 62 Ala. 180. That a man by paying addresses to a woman affirms that he is unmarried, see *Pollock v. Sullivan*, 53 Vt. 507; *Bennett v. Beam*, 42 Mich. 346. "The silence of the party must amount to a direct affirmation, and must be deemed equivalent to it"—*Ludlow, J., aff. in People's Bank's App.*, 93 Penn. St. 109.

<sup>1</sup> See for authorities, *infra*, § 256. But the entire omission to answer a question in a written application for insurance does not avoid the policy. *Armenia Insurance Co. v. Paul*, 91 Penn. St. 520.

<sup>2</sup> *Infra*, § 256 a; *Gordon v. Gordon*, 3 Sw. 400; *Fane v. Fane*, L. R. 20 Eq. 698.

<sup>3</sup> *Pollock*, 3d ed. 520; *Lindley*, i. 579. What has been said in respect to partnership applies to parties proposing business (*infra*, § 255), and promoters of companies (*infra*, § 255 a).

<sup>4</sup> *Pollock*, 3d ed. 509.

<sup>5</sup> To this is cited *Flight v. Booth*, 1 Bing. N. C. 370.

the duty of the party acquainted with the property to give substantially correct information, at all events, to the extent of his own actual knowledge, of all facts material to the description or title of the estate offered for sale, but not of extraneous facts affecting its value: the seller, for example, is not bound to tell the buyer what price he himself gave for the property." But (1) the cases of avoidance of sales cited by Mr. Pollock are cases of actual misrepresentations; and (2) even supposing the rule to be good in England, where the title to land is not a matter of record, in this country the rule does not apply for the reason that the title is a matter of record, to be determined by an official search.<sup>1</sup> Even in England it was decided, in the House of Lords,<sup>2</sup> that a vendor's silence as to a right of way over land sold by him, of which right of way he was not shown to have been aware, is no cause for setting aside the sale. This decision is undoubtedly severely criticized by Lord St. Leonards,<sup>3</sup> and by Mr. Pollock,<sup>4</sup> who says that "it seems an extraordinary, not to say dangerous doctrine, to say that a vendor is not bound to know his own title, so far, at least, as with ordinary diligence he may know it." But however this may be in England, the position is not applicable to this country, where a record title is all that is sold and all that is bought.<sup>5</sup>

§ 218. A condition precedent in its technical sense, as we shall have occasion to see more fully,<sup>6</sup> precludes such a concurrence of minds as constitutes an immediately effective contract. It is, "if a certain state of facts exists, then we agree that a certain thing shall be done."<sup>7</sup> The thing is not to be done unless the condition is satisfied. A warranty, on the other hand, implies a concurrence of minds as to an immediate effect. It is this: "Such a thing is to be done, but if a statement made be not correct, the

A condition negates concurrence of minds; warranty assumes concurrence, but gives damages for misstatement.

<sup>1</sup> See *infra*, §§ 249, 250.

<sup>2</sup> *Wilde v. Gibson*, 1 H. L. C. 605, reversing s. c. *Gibson v. D'Este*, 2 Y. & C. 542.

<sup>3</sup> *Sug. Law of Prop.* 614, 634.

<sup>4</sup> *Pollock*, 3d ed. 518.

<sup>5</sup> That withholding of facts which business sagacity might discover is not misrepresentation, see *infra*, § 249.

<sup>6</sup> *Infra*, §§ 545 *et seq.*

<sup>7</sup> *Supra*, § 5.



party imposed upon is to recover damages from the other party for the injury he has sustained.” In a larger sense, however, a warranty has been defined to be “a condition the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.”<sup>1</sup>—*Bannerman v. White*<sup>2</sup> is cited<sup>3</sup> as a leading case on the distinction between conditions and representations. The suit in that case was brought on a contract for the purchase of a crop of hops; and it appeared that when the negotiation began, the defendant asked the plaintiff whether sulphur had been used in raising the crop, and that the plaintiff answered, it had not. It appeared that sulphur, employed as a fertilizer, facilitates the raising of hops, but reduces their market value. The defendant agreed to purchase the crop on the supposition that sulphur had not been used; but it turned out that sulphur had been used, for the purpose of trying a new machine, in five acres, the whole crop covering 300 acres, but that the produce of the entire crop had been mixed together. The defendant’s statement appeared to have been inadvertently made, he having forgotten the use of the sulphur, or having regarded it as so trivial as to be unimportant. The jury found the representation not to have been wilfully false, but that it “was intended by the parties to be part of the contract and a warranty by the plaintiff.” The court held that the non-use of sulphur was a condition, the non-existence of which vitiated the sale.—“We avoid,” said Erle, C. J., “the term *warranty* because it is used in two senses, and the term *condition* because the question is, whether that term is applicable; then, the effect is that the defendants required, and that the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this

<sup>1</sup> Anson, 135; see May on Ins. § 184.

<sup>2</sup> 10 C. B. N. S. 844.

<sup>3</sup> Benj. 3d Am. ed. 604; Anson, 136.

stipulation that the contract should remain valid if sulphur had been used.—The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged.”<sup>1</sup>

§ 219. No particular words are essential to constitute a warranty.<sup>2</sup> Any representation made at the time of a sale is a warranty if it was understood by the parties to be such.<sup>3</sup> But estimates of value are not warranties;<sup>4</sup> nor are conjectural opinions or puffs.<sup>5</sup> As will hereafter be seen more fully, an article sold which

Warranty  
need not be  
in any  
particular  
words.

<sup>1</sup> See, to same effect, *Baglehole v. Walters*, 3 Camp. 154; *Brown v. Edgington*, 2 M. & G. 290; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Lyon v. Bartram*, 20 How. U. S. 149; see *infra*, §§ 549 *et seq.*

<sup>2</sup> *Benj. on Sales*, 3d Am. ed. §§ 613 *et seq.*; *infra*, §§ 549 *et seq.*; *Leake*, 2d ed. 404; *Pasley v. Freeman*, 3 T. R. 57; *Medina v. Stoughton*, 1 Lord Ray. 593; *Stucley v. Bailey*, 1 H. & C. 405; *Morrill v. Wallace*, 9 N. H. 111; *Henshaw v. Robins*, 9 Met. 88; *Warren v. Coal Co.*, 83 Penn. St. 437; *Blythe v. Speake*, 23 Tex. 430; *Polhemus v. Heiman*, 45 Cal. 573. That no particular words are required to constitute an express warranty, see, in addition to the above cases, *Hillman v. Wilcox*, 30 Me. 170; *Bryant v. Crosley*, 40 Me. 18; *Randall v. Thornton*, 43 Me. 226; *Bond v. Clark*, 35 Vt. 577; *Chapman v. Murch*, 19 John. 290; *Roberts v. Morgan*, 2 Cow. 438; *Whitney v. Sutton*, 10 Wend. 412; *Hawkins v. Pemberton*, 51 N. Y. 198; *Weimer v. Clement*, 37 Penn. St. 147; *Horn v. Buck*, 48 Md. 358; *Henson v. King*, 3

*Jones*, N. C. 419; *Carter v. Black*, 46 Mo. 384; *Kenner v. Harding*, 85 Ill. 264; *Sparling v. Marks*, 86 Ill. 125; *Clark v. Ralls*, 50 Iowa, 275; *Jack v. R. R.*, 53 Iowa, 399; *Robson v. Miller*, 12 S. C. 580; *Claghorn v. Lingo*, 62 Ala. 230. “The question as to whether a statement constitutes a warranty is often a difficult one. It may depend not only upon the words used, but upon the character of the thing sold, the known character of the buyer, his opportunity for inspection, or whatever else may reveal anything in regard to the real understanding of the parties. It is a question for the jury under a proper instruction.” *Adams, Ch. J., McDonald Man. Co. v. Thomas*, 53 Iowa, 561, citing *Tewkesbury v. Bennett*, 31 Iowa, 83.

<sup>3</sup> *Randall v. Thornton*, 43 Me. 226; *Reed v. Hastings*, 61 Ill. 266; *Robinson v. Harvey*, 82 Ill. 58.

<sup>4</sup> *Infra*, § 260.

<sup>5</sup> *Infra*, §§ 259, 263; see notes to *Chandler v. Lopus*, 1 Smith’s Lead. Cas. 7th Am. ed. 299 *et seq.*

does not answer the description may be returned,<sup>1</sup> or the vendor may be sued on the warranty;<sup>2</sup> an article supplied to order is warranted to answer the order;<sup>3</sup> when the vendor is specially trusted, he is liable on implied warranty of fitness;<sup>4</sup> though it is otherwise when the purchaser buys on his own judgment.<sup>5</sup> It will be also seen that warranty may be implied from usage;<sup>6</sup> that warranty does not cover depreciation in transit;<sup>7</sup> that conditions imposed by local law must be complied with;<sup>8</sup> that on sales by sample, the article sold must conform to sample;<sup>9</sup> that the purchaser may reject articles that do not correspond to sample;<sup>10</sup> that average correspondence with sample is sufficient,<sup>11</sup> and that warranty may be added to sample.<sup>12</sup>

§ 220. A specification of a warranty on one point may exclude the implication of warranty on other points.<sup>13</sup>

Thus a contract to deliver Centre County iron, for a full market price, is satisfied if Centre County iron, believed at the time to be good, is delivered.<sup>14</sup> On the sale of a fertilizer the following statement was given: "It is guaranteed to me, as to its effect on crops, only as to the analysis of the state inspector, as evidenced by his brand on each and every article." It was held in Georgia, in

Warranty on one point excludes general implied warranty.

<sup>1</sup> *Infra*, § 903.

<sup>2</sup> *Infra*, § 904.

<sup>3</sup> *Infra*, § 905.

<sup>4</sup> *Infra*, § 906.

<sup>5</sup> *Infra*, § 907.

<sup>6</sup> *Infra*, § 910.

<sup>7</sup> *Infra*, § 911.

<sup>8</sup> *Infra*, § 913.

<sup>9</sup> *Infra*, § 914.

<sup>10</sup> *Infra*, §§ 225, 565.

<sup>11</sup> *Infra*, § 915 *et seq.*

<sup>12</sup> *Infra*, § 918.

<sup>13</sup> *Infra*, § 909; *Benj. on Sales*, 3d Am. ed. § 666; *Budd v. Fairman*, 8 Bing. 51; *Parkinson v. Lee*, 2 East, 314; *Dickson v. Zizinia*, 10 C. B. 602; *Willard v. Stevens*, 24 N. H. 271; *Deming v. Foster*, 42 N. H. 165; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Gill v. Kaufman*, 16 Kan. 571.

<sup>14</sup> *Kirk v. Nice*, 2 Watts, 367. Whether a statement that a cow is "all right" is a warranty is a question of fact for the jury. *Tuttle v. Brown*, 4 Gray, 457. In *Power v. Barham*, 7 C. & P. 356, 6 N. & M. 62, 4 Ad. & El. 476, Lord Denman left it to the jury to determine whether a statement, "Four pictures, views in Venice, Canaletti," was a warranty. See more fully, *infra*, § 249. An opinion (there being no fraud) that a mare is kind and gentle is not a warranty. *Jackson v. Wetherill*, 7 S. & R. 480; *McFarland v. Newman*, 9 Watts, 55. Nor is an opinion as to value. *Infra*, § 250; *Wetherill v. Neilson*, 20 Penn. St. 448; *Whitaker v. Eastwick*, 75 Penn. St. 229.

1880, that the purchaser could claim on no other warranty than that as to the genuineness of the inspector's brand.<sup>1</sup>

§ 221. Supplying for a particular purpose implies fitness for that purpose in all cases where special confidence is placed in the vendor.<sup>2</sup> In point of law, if a person sold a commodity for a specific purpose, and with knowledge at the time of sale that it was to be applied to that purpose, he must be understood to warrant that the commodity so sold should be reasonably fit and proper for the purpose for which it was sold.<sup>3</sup> Even a latent defect, unknown to the vendor, is within this rule. A carriage builder, for instance, who supplies a customer a pole for a carriage, fitting it to the carriage, is to be regarded as warranting its soundness, and is responsible for a latent defect, of which he is not aware, which causes the pole to break.<sup>4</sup> But selling for a particular purpose is not to be understood as warranting that the thing sold will be adapted to any peculiar conditions in which it may be placed. General adaptation is all that is implied.<sup>5</sup> Nor is a warranty of fitness implied in the sale by a peddler of a patented article.<sup>6</sup>—In connection with the above rulings may be noticed a case before the Eng-

<sup>1</sup> Jackson v. Langston, 61 Ga. 392.

<sup>2</sup> *Infra*, §§ 248, 263 *et seq.* As to warranty, § 905. As to articles made to order, § 903; Leake, 2d ed. 404; Benj. on Sales, 3d Am. ed. §§ 645 *et seq.*; Brown v. Edgington, 2 M. & G. 279; Sutton v. Temple, 12 M. & W. 64; Jones v. Bright, 5 Bing. 533; Ollivant v. Bayley, 5 Q. B. 288; Jones v. Just, L. R. 3 Q. B. 202; Smith v. Marrable, 11 M. & W. 5; Lomi v. Tucker, 4 C. & P. 15; Deming v. Foster, 42 N. H. 165; Doggett v. Emerson, 3 Story, 700; Beals v. Olmstead, 24 Vt. 114; Emerson v. Brigham, 10 Mass. 197; Winsor v. Lombard, 18 Pick. 60; Mansfield v. Tregg, 113 Mass. 354; Pacific Iron Works v. Newhall, 34 Conn. 67; Van Bracklin v. Fonda, 12 Johns. 468; Gallagher v. Waring, 9 Wend. 20; Dounce v. Dow, 57 N. Y.

21; Rodgers v. Niles, 11 Oh. St. 48; Byers v. Chapin, 28 Oh. St. 300; Brenton v. Davis, 8 Blackf. 317; Leopold v. Van Kirk, 27 Wis. 152; Robson v. Miller, 12 S. C. 586; Byrne v. Jansen, 50 Cal. 624. That an article made to order must answer order, see *infra*, § 905.

<sup>3</sup> Lord Tenterden, Gray v. Close, 6 D. & R. 200.

<sup>4</sup> Randall v. Newson, L. R. 2 Q. B. D. 102. See notes to Chandler v. Lopus, 1 Smith's L. C. 7th ed. 299 *et seq.*; *infra*, § 903.

<sup>5</sup> Chanter v. Hopkins, 4 M. & W. 399; Port Carbon Iron Co. v. Groves, 68 Penn. St. 149.

<sup>6</sup> Matthews v. Hartson, 3 Pitts. 86. That when the vendor is specially trusted his representations bind is hereafter seen. *Infra*, § 905.

lish Court of Appeals in 1881. The plaintiff agreed to take a named steam-tug, towing six sailing barges, from Hull to the Brazils, paying and providing for the crew, and furnishing all necessary instruments. The defendants agreed to pay for these services 1020/. After the starting, the boilers and engines of the steam-tug in question turned out to be considerably out of repair, and in consequence the voyage occupied sixty days more than it would otherwise have done. The fact of the engines being out of repair was not known to either party at the time of the contract. Judgment was entered by Lord Coleridge for the plaintiff. This, however, was reversed in the Court of Appeals, on the ground that there was no implied warranty by the defendants that the tug should be reasonably efficient for the purposes of the voyage.<sup>1</sup>

<sup>1</sup> Robertson v. Amazon Tug Co., 45 L. T. N. S. 317; reversed, S. C. L. R. 7 Q. B. D. 598.

The reversal, however, was carried by Brett, L. J., and Cotton, L. J., against Bramwell, L. J., who concurred with Lord Coleridge; and the question, so far as the weight of authority is concerned, must be considered still open.

"The plaintiff," said Lord Coleridge, in the court below, "undertakes to conduct the fleet across the Atlantic, that is, to do under particular circumstances particular work. He furnishes a great deal of the necessities incidental to the voyage—not the engines or engineers—but he engages the sailors, stokers, and trimmers, from Hull to Para. There must be an undertaking on the part of the defendants that the *Villa Bella* was reasonably fit to do the work on which she was to be engaged. The plaintiff was entitled to say: 'I had an instrument supplied by the defendants to do this work, and such instrument ought to have been reasonably fit to do it.' The contrary contention seems full of difficulties, insuperable difficulties to my mind.

Suppose the *Villa Bella*, undoubtedly incompetent to fulfil the task assigned to her, and with terrible danger to life, occupies a period beyond all time in the contemplation of the parties, a year we will say, instead of seventy days; yet the captain would be liable, and he would be met with the statement, 'You took the risk and must abide by it,' so that nothing could he recover for the valuable time spent by him, and for losses incurred by making good the defects, and paying for expenses brought about by the protracted voyage. If the plaintiff at an earlier stage had made himself acquainted with the state of this steamer, and had refused to perform the duties imposed on him on the ground of the impossibility of carrying out the contract, it was said in argument that he would be held liable for such refusal. Now, either the grounds of his refusal would be no answer—the impossibility being short of a physical impossibility; or they would be an answer to an action at the suit of the defendant company. This shows that there was an implied contract on the part of the defendants that the *Villa Bella* should be fit for the

—The sale by a manufacturer of goods ordered from him in his own specialty implies that these goods were manufactured by him. Thus, in a case<sup>1</sup> in the English Court of Appeals in

purposes of the voyage, and therefore an undertaking on the part of the defendants that the *Villa Bella* should be reasonably fit for the services the plaintiff undertook to perform in her.”

In the opinion of Brett, L. J., arguing for reversal, we have the following :

“The *Villa Bella* was a vessel with damaged engines at the time the contract was made; it was that vessel with these engines, such as they were, that the plaintiff undertook to conduct across the Atlantic. Now I think there would be an implied contract on the part of the defendants that they would not, by want of reasonable care, allow that vessel with its damaged engines to get more out of repair at the time the voyage was to commence than it was at the time that the contract was made. I think they were bound by an implied contract to take all reasonable care to keep the vessel as good and as efficient for the work it was to do as it was at the time the contract was made. But it would be to say that they were bound to make it better than it was at the time of the contract, if it is to be said that they were bound to hand it over to the plaintiff in a state reasonably fit for the purpose of the work it was to do. Now, as I understand my lord, he would not imply such a contract as that, but if he would, I must say that, with all deference, I cannot agree to it. When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made, and which is not specific, and a contract with regard to a specific thing. In the one case you

take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made. Therefore it seems to me that the judgment of my lord really does, I believe, come to what was the opinion of Lord Coleridge, although in words he negatives it. It seems to me that he holds that the defendants were bound to supply this large tug in a condition reasonably fit for the purpose for which the contract was made, and the breach upon which he relies really is that it was not so fit, whereas it seems to me that there was no such implied contract. I wish to put my view as plainly as I can. If there had been evidence in this case that, after the contract was made, the machinery, from want of reasonable care by the defendants, had become in a worse condition than it was at the time of the contract, I should have thought that there would have been a breach of contract, for which the defendants would have been liable. But I find no such evidence. The only misfortune about the tug was that the machinery at the time the contract was made was in such a condition that the vessel was not reasonably fit for the purpose of taking barges across the Atlantic. Therefore the misfortune which happened was the result of a risk which was run by the plaintiff, and of which he cannot complain, and consequently he has no cause of action as regards the *Villa Bella*.”

<sup>1</sup> *Johnson v. Raylton*, L. R. 7 Q. B. D. 438. See remarks in *Chicago Packing Co. v. Tilton*, 87 Ill. 555; and comments in *Alb. Law J.* Nov. 26, 1881, and in *Scottish Jour. of Jur. infra*, § 223.

1881, the defendants agreed to buy from the plaintiffs, who were manufacturers of iron plates, 2000 tons of iron ship plates, the iron to be of the quality known as "Crown," to pass on Lloyd's survey, to be delivered at the defendants' ship-yard. The document containing the contract was headed, "The Moor Ironworks, Stockton-on-Tees," and stamped with the plaintiffs' trade-mark. In consequence of the temporary closing of the plaintiffs' works, they were unable to supply plates of their own manufacture, but supplied plates of the quality known as "Crown," passed at Lloyd's. The defendants refused to accept these. Suit was brought on the contract. At the trial, the defendants tendered evidence of mercantile usage that the manufacturer who contracted to sell could not fulfil his contract by supplying articles manufactured by some one else. This evidence was rejected, and judgment was entered for the plaintiffs. It was held (Bramwell, L. J., dissentiente) that judgment should be entered for the defendants, the onus being upon the plaintiffs to show a mercantile usage that the manufacturer who contracted to sell could fulfil his contract by supplying articles manufactured by some one else, and no such evidence having been tendered. In the course of his opinion, Cotton, L. J., said: "If the contention of the plaintiffs is right, they are at liberty to supply goods of any maker, and, therefore, in my opinion, it is not material with reference to the question now under consideration that the plaintiffs in fact proposed to supply plates as good as those manufactured by themselves, though this would be material on the question of damages if the defendants were suing the plaintiffs for breach of their contract. The plaintiffs relied on two recent decisions of the Court of Session, which no doubt are in their favor.<sup>1</sup> But, although we ought to pay respect to the opinion on a point of law common to both England and Scotland expressed by that court, their decisions cannot be considered binding here, and the authority of these cases is much diminished by the fact that Lord Young dissented from the opinions of the majority of the court. I think the view of Lord Young more correct than that of the major-

<sup>1</sup> As to these cases see *infra*, note to § 223.

ity, and I am of opinion that when a purchaser orders goods from a firm which is a manufacturer only of such goods, not a dealer in them, then, unless it is shown that in the particular trade, or as regards the particular goods, there is a practice or usage for the manufacturer to supply the goods of other makers, the purchaser must be assumed to have contracted with the particular manufacturers in reliance on the general excellence of the work of their firm, and is entitled, in the absence of any express stipulation to the contrary, to have, in performance of the contract, goods of the manufacturers' own make. It is said that the clause as to strikes shows on this contract a contrary intention. But this is not, I think, the necessary or fair construction of this clause. I think the clause rather assumes that stoppage of the manufacturers' works would probably prevent them from performing their contract, though notwithstanding the stoppage of the works the manufacturers might have plates of their own make which they would supply. The result, in my opinion, is that judgment should be entered for the defendants; for it would be for the plaintiffs to show that the custom of the trade enabled them to supply ship plates of other makers, and, as the plaintiffs objected to the evidence tendered by the defendants to show the usage of the trade, we ought, I think, to assume that the plaintiffs could not adduce such evidence as, in my opinion, is necessary to support their contention."

§ 222. There has been much discussion on the question whether there is an implied warranty of wholesomeness in sales of provisions. We have the high authority of Blackstone<sup>1</sup> to this effect; and in Chitty on Contracts the same position is broadly affirmed.<sup>2</sup> We have numerous authorities in this country tending in the same direction, so far as concerns articles sold for domestic use;<sup>3</sup> and this view is strengthened by the rulings in

Selling  
meat for  
human  
food im-  
plies fit-  
ness.

<sup>1</sup> Com. iii. p. 166.

<sup>2</sup> Op. cit. 9th ed. 420.

<sup>3</sup> *Infra*, § 912; see citations in Benj. on Sales, 3d Am. ed. § 671, including Winsor v. Lombard, 18 Pick. 57; French v. Vining, 102 Mass. 132; How

ard v. Emerson, 110 Mass. 321; Van Bracklin v. Fonda, 12 John. 468; Hart v. Wright, 17 Wend. 267; Goldrich v. Ryan, 3 E. D. Smith, 324; Moses v. Mead, 1 Denio, 378; Osgood v. Lewis, 2 H. & Gill, 498; Humphreys v. Com-



criminal prosecutions that it is an indictable offence to expose for human food articles known to be unfit for such food.<sup>1</sup> In England, however, it is now held that there is no general implied warranty on sales of food, except in cases of "victuallers, butchers, and other common dealers in victuals, under the statute 51 Henry III.;"<sup>2</sup> and Mr. Benjamin asserts that "the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food, does not arise out of any contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any damage caused by their sale of unwholesome food."<sup>3</sup>

line, 8 Blackf. 516; *Davis v. Murphy*, 14 Ind. 158; and see notes to *Chandeler v. Lopus*, 1 Smith, L. C. 7th Am. ed. 299.

<sup>1</sup> Wh. Cr. L. 8th ed. §§ 1434 *et seq.* See *Ward v. Hobbs*, L. R. 3 Q. B. D. 150, L. R. 4 Ap. Cas. 13; holding that sending infected pigs to market is not a deceit at common law. See this case noted *infra*, §§ 229, 251, and see *French v. Vining*, 102 Mass. 135, cited *infra*, § 249.

<sup>2</sup> *Burnby v. Bollett*, 16 M. & W. 644.

<sup>3</sup> Op. cit. § 672; *Emmertson v. Matthews*, 7 H. & N. 586, where the plaintiff, a butcher, bought of a general dealer (the plaintiff not buying for domestic use) a carcase of meat consigned to the defendant, which turned out not to be fit for consumption, but which the plaintiff, an expert in such matters, bought on his own inspection. It was held there was no implied warranty. In *Burnby v. Bollett*, 16 M. & W. 644, it was held there was no implied warranty, on the ground that the vendor was not a dealer in meat. See *infra*, § 912.

In *Lukens v. Freund*, Sup. Ct. Kan. 1882, 25 Alb. L. J. 392, F., the plaintiff below, a farmer, bought of L., the defendant below, a miller, a bag of bran for the purpose of feeding his cows. Accidentally and without any negli-

gence on the part of L., but before removal from the mill, two copper clasps fell into the bran, were thereafter swallowed by one of F.'s cows, and lodging, one in her paunch and one in her stomach, poisoned and killed her. The bran was not manufactured for F. or upon any contract with him, but was simply sold out of a quantity then on hand belonging to L., and could have been inspected by F. at the time of purchase if he had desired. It was held by the supreme court, after a careful analysis of the authorities, that in the absence of express warranty, F. could not recover for the loss of his cow.

After recognizing the position that fitness is implied in sales for human food, *Brewer, J.*, went on to say: "Now the application of this exception to the case at bar is denied; it is said that the principle upon which the exception rests does not apply where the articles sold are not intended for consumption by man but only for use as food for cattle. No authorities have been found by counsel on either side of this question. We are left, therefore, to determine it upon general principles. Upon what ground is an implied warranty rested in the case of the sale of provisions which does not exist in the case of a sale of other articles? Obviously it is not upon any

§ 223. Selling by a merchant in the ordinary course of business implies that the goods are of the character designated, and are merchantable.<sup>1</sup> "The fundamental understanding is,

property grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge. One may not place poison where it is likely to be taken by one ignorant of its qualities. Regard for human life compels this; no more may he sell food unfit to be eaten to a man who he knows is buying it to eat. The same reason controls, to wit, regard for life and health. But this, it will be remembered, is an exception to the general rule of the common law, and the exception should not be extended beyond the reach of the reasons upon which it is based.

-- "If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered. Now the claim of the plaintiff is simply of a property loss, that his estate has been diminished, and that alone is his cause of action. His injury is similar to that which he would have sustained if he had purchased from a wagon-maker a defective wheel, and thereby his wagon had broken down. No matter of life or health of himself or family is involved. We think, therefore, that no recovery can be had under the principles of this third exception.

"Still further, it may be remarked that bran comes very nearly within the description given by some of the witnesses of it as the mere refuse or offal

of the mill. It is true the jury call it in their verdict a secondary product resulting from the manufacture of flour. It certainly is not the principal product of the grinding of wheat, nor that for which the mill is worked. It is that which is left after the flour has been manufactured. It is no uncommon thing in manufacturing establishments, after the principal product is manufactured, that there remains a refuse which is of some value, and which is disposed of by the manufacturer as refuse, and for whatever it will bring. Now it would seem to enlarge very broadly the doctrine of implied warranty, to extend it to this refuse. It is not that for the manufacture of which the manufacturer engages in business, it is not that to which he devotes his special attention and care, it is always of inferior value. This all parties understand; they deal upon that basis, and to hold that the manufacturer warrants the quality of this refuse would seem to cast an unnecessary burden upon its disposal."

<sup>1</sup> *Infra*, §§ 905, 919 *et seq.*; Leake, 2d ed. 407; Benj. on Sales, 3d Am. ed. §§ 657, 661, 806, 857; Laing v. Fidgeon, 6 Taunt. 108; Josling v. Kingsford, 13 C. B. N. S. 447; Jones v. Just, L. R. 3 Q. B. 197; Bigge v. Parkinson, 7 H. & N. 955; Thrall v. Newell, 19 Vt. 202; Henshaw v. Robins, 9 Met. 87; Gaylord Man. Co. v. Allen, 53 N. Y. 515; Borrekens v. Bevan, 3 Rawle, 23; Edwards v. Hathaway, 1 Phila. 547; Batters v. Sellers, 6 Har. & J. 249; Hyatt v. Boyle, 5 Gill & J. 110; Rodgers v. Niles, 11 Oh. St. 48; McClung v. Kelly, 21 Iowa, 508; Mann v. Evason, 32 Ind. 355; Merriam v. Field, 24 Wis. 640; Hanks v. McKee, 2 Litt. 227; Howie v.

that the article offered or delivered shall answer the description of it contained in the contract. If the subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose."<sup>1</sup> But as will be hereafter seen more fully, when an article is ordered as such from a manufacturer, "if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."<sup>2</sup>—It has just been stated that not only is it a condition precedent that goods sold should be substantially what they are described to be,<sup>3</sup> but there is an implied warranty, in cases where there is no opportunity for inspection, that they should be salable. The rule is thus definitely expressed by Lord Ellenborough:<sup>4</sup> "Under such circumstances (*i. e.*, sale without opportunity of inspection), the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat*

Selling by merchant implies merchantability.

Rea, 70 N. C. 559. See notes to *Chandler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*

<sup>1</sup> Per cur. in *Randall v. Newson*, L. R. 2 Q. B. D. 109, adopted in *Leake*, 2d ed. 408. In *Gossler v. Sugar Refinery*, 103 Mass. 331, it was held that a sale, by an importer, of "Manilla sugar" to refiners, would sustain a suit for the price agreed on, although the article delivered contained more impurities than is usual with articles of that class. And this rule applies generally in cases where the distinctive character of the article is not affected. See *Swett v. Shumway*, 102 Mass. 365 ;

*Whitney v. Boardman*, 118 Mass. 242 ; *Jennings v. Gratz*, 3 Rawle, 168 ; *Wetherill v. Neilson*, 20 Penn. St. 448. Elaborate notes on this topic will be found in *Benj. on Sales*, 3d Am. ed. §§ 600, 661.

<sup>2</sup> *Benj. on Sales*, 3d Am. ed. § 657, citing *Chanter v. Hopkins*, 4 M. & W. 399, discussed *infra*, § 905 ; and see notes to *Chandler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*

<sup>3</sup> As to conditions precedent, see *infra*, § 560.

<sup>4</sup> *Gardiner v. Gray*, 4 Camp. 144 ; adopted in *Benj. on Sales*, 3d Am. ed. § 656.

*emptor* does not apply.<sup>1</sup> He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be *salable in the market* under the denomination mentioned in the contract between them.”—In 1863, after a series of intermediate approvals, this rule was finally reaffirmed by the Queen’s Bench, where the following distinctions were taken:<sup>2</sup> First, where there is an opportunity of inspection by the purchaser, and no fraud, there is no implied warranty, even though the defects are latent and the goods not merchantable;<sup>3</sup> second, nor is there an implied warranty as to an article even when specifically described, “the actual condition of which is capable of being ascertained by either party;”<sup>4</sup> thirdly, there is no implied warranty as to an article ordered from a manufacturer, and delivered as described by the purchaser.<sup>5</sup>—It has been already seen, that a warranty need not be in any particular words.<sup>6</sup>

<sup>1</sup> On this point Judge Bennett refers, in a note as to sales of packed cotton, to *Boorman v. Jenkins*, 12 Wend. 566; *Beebe v. Robert*, *id.* 413; *Oneida Man. Co. v. Lawrence*, 4 Cow. 444; *Waring v. Mason*, 18 Wend. 425; *Salisbury v. Stamer*, 19 *id.* 159; as to canned fruit or vegetables, to *Boyd v. Wilson*, 83 Penn. St. 319; *S. P., Whitaker v. McCormick*, 6 Mo. Ap. 114.

<sup>2</sup> *Jones v. Just*, L. R. 3 Q. B. 197.

<sup>3</sup> *Emmerton v. Matthews*, 7 H. & N. 586.

<sup>4</sup> *Barr v. Gibson*, 3 M. & W. 390.

<sup>5</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288, cited in prior section.

<sup>6</sup> *Supra*, § 219. That a representation may operate as an estoppel, see *infra*, § 226; that a sale “with all faults” excludes warranty, *infra*, § 229; and that a warranty of title is implied in a sale, *infra*, § 230.—We have already seen that in *Johnson v. Raylton*, L. R. 7 Q. B. D. 438, it was held by a majority of the court of appeal (see more fully *supra*,

§ 221) that on a sale by a manufacturer of goods of a class manufactured by him, there is an implied contract that the goods were of his manufacture. In Scotland, however, it was held, in 1880 and 1881, that where a manufacturer tenders goods of equal value with those manufactured by himself, in performance of a contract for the sale of such goods, the purchaser is not entitled to refuse them. There is, therefore, a conflict on this point between the Scotch and the English courts, which will be remitted to the house of lords for settlement. The question is discussed in an article in the *Journal of Jurisprudence*, reprinted in the *American Law Record* for May, 1882 (vol. x. p. 641).—It is to be observed, however, that the Scotch judges were not unanimous in the decision they reached, and that those holding that the manufacturer was not liable agreed that, when he has a peculiar make or brand in the market, or when it can be supposed that there is any *pretium affec-*

§ 224. An implied warranty is not to be extended to goods open to the inspection of the buyer, supposing he has both opportunity and capacity adequately to judge, he buying on this inspection.<sup>1</sup>—

Defects open to inspection not warranted against.

*tionis*, he is bound to supply goods of his own make, even if there be no stipulation to that effect in the contract. "Where the conflict of opinion commences," says the Journal of Jurisprudence, "is where none of these elements are present, where the article sold has no special repute, or name, or other distinction, but is such that one maker's make is as good as another's."

<sup>1</sup> *Infra*, §§ 227, 245, and 907; Benj. on Sales, 3d Am. ed. § 657; Jones v. Just, L. R. 3 Q. B. 197; Gardiner v. Gray, 4 Camp. 144; Deming v. Foster, 42 N. H. 165; Vandewalker v. Osmer, 65 Barb. 556; Lord v. Grow, 39 Penn. St. 88; see Hight v. Bacon, 126 Mass. 10, cited *infra*, § 907; Morris v. Thompson, 85 Ill. 16; Cogel v. Kniseley, 89 Ill. 598; Robinson Machine Works v. Chandley, 56 Ind. 575; Gammell v. Gunby, 52 Ga. 504. In Hyatt v. Boyle, 5 Gill & J. 110, the warranty in such cases is limited to cases where the examination is "impracticable." The rule in Randall v. Newson, above given, in implying a warranty of merchantability, goes beyond the earlier English cases, which limit such warranty to cases where there is no opportunity given the buyer of examination. The latter has been the prevalent rule in the United States. Stevens v. Smith, 21 Vt. 90; Mixer v. Coburn, 11 Met. 561; Lamb v. Crafts, 12 Met. 353; Hart v. Wright, 17 Wend. 276; Wright v. Hart, 18 Wend. 456; Salisbury v. Stainer, 19 Wend. 159; Hoe v. Sanborn, 21 N. Y. 552; Van Wyck v. Allen, 69 N. Y. 61. In Howard v. Hoey, 23 Wend. 350, Bronson, C. J., argues that a warranty of merchantability is to be implied in all executory

sales; S. P., Moses v. Mead, 1 Denio, 378; and to this effect is the rule in Pennsylvania. Borrekens v. Bevan, 3 Rawle, 23; see notes to Chandelier v. Lopus, 1 Smith's L. C. 7th Am. ed. 299 *et seq.* "It has always been held," said Dickinson, J., in a case in 1881 in Minnesota, McCormick v. Kelly, "that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, namely, that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. Margetson v. Wright, 7 Bing. 603; Dyer v. Hargrave, 10 Ves. Jr. 506; Schuyler v. Russ, 2 Caines, 202; Kenner v. Harding, 85 Ill. 264; Williams v. Ingram, 21 Tex. 300; Marshall v. Drawhorn, 27 Ga. 275; Shewalter v. Ford, 34 Miss. 417; Brown v. Bigelow, 10 Allen, 242; Story on Contr. § 830; Benj. on Sales (2d. ed.), 502; Chitty on Contr. (11th Am. ed.) 644. A warranty for the breach of the condition of which an action *ex contractu* for damages can be maintained, must be a legal contract, and not a mere naked agreement. It must be a representation of something as a fact, upon which the purchaser relies and by which he is induced, to some extent, to make the purchase, or is influenced in respect to the price or consideration. Manuf. Society v. Lawrence, 4 Cow. 440; Lindsey v. Lindsey, 34 Miss. 432; Blythe v. Speake, 23 Tex. 429; Adams v. Johnson, 15 Ill. 345; Ender v. Scott,

But where there is an express warranty, a vendee is not bound to look for defects. He has a right, when these defects do not obviously appear, to rely on the warranty.<sup>1</sup>—Where goods have been in the buyer's hands for some time before the sale, no warranty as to defects open to observation will be implied.<sup>2</sup>—That in cases open to inspection, a fault, to be covered by an implied warranty, must be latent (*vitium latens*), is a settled rule of the Roman law,<sup>3</sup> but unless the purchaser is an expert, it is enough that it should be of a character to escape the notice of ordinary observers, “*talis tamen morbus sit, qui omnibus potuit apparere.*”<sup>4</sup> The purchaser is bound to exercise the care of a good business man of his class. “*Ignorantia emtori prodest, quae non in supinum hominem cadit,*”<sup>5</sup> “*non dissolutam ignorantiam emtoris excusari oportebit.*”<sup>6</sup> A party cannot recover for a loss which his own negligence provokes; and as negligence of this class will be regarded an omission to look at obvious conditions in an article tendered for inspection.—If a physical defect is skilfully covered up by the vendor, the latter becomes liable in an action for deceit. If it is not covered up, then either the purchaser's negligence is to be chargeable with the loss, or he is to be regarded as having agreed to take the article as it is.<sup>7</sup>

Selling by sample implies correspondence with sample.

§ 225. As we will hereafter have occasion to see more fully, selling by sample implies that the goods should correspond in quality to the sample, and if there be a material variance, the purchaser may rescind.<sup>8</sup> The sample excludes an implied warranty

11 *ib.* 35; Hawkins *v.* Berry, 5 Gilm. 36; 2 Add. on Contr. 626 (Morgan's ed.).” And see Pinney *v.* Andrews, 41 Vt. 631; Scarborough *v.* Reynolds, 13 Rich. 98; Hameright *v.* Storer, 31 Ga. 300.

<sup>1</sup> *Infra*, § 227; Benj. on Sales, 3d Am. ed. § 618; citing Tye *v.* Fynmore, 3 Camp. 462; Henshaw *v.* Robins, 9 Met. 83; see fully for cases, *infra*, § 227.

<sup>2</sup> Dooley *v.* Gallagher, 3 Hughes, C. C. 214.

<sup>3</sup> L. 1, § 6; L. 14, § 10; L. 48, § 4, D. h. t.

<sup>4</sup> L. 10, § 14, D. h. t.; Koch, II. 471.

<sup>5</sup> L. 15, § 1, D. de contr. emt. (16, 1).

<sup>6</sup> L. 55, i. f. D. h. t.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Infra*, § 914. In Nichols *v.* Godts, 10 Ex. 191, a seller was held responsible for adulteration of rape oil, sold as rape oil, even though the bulk corresponded with the sample.

on all matters within its range;<sup>1</sup> but not as to matters outside such range, nor as to matters not discoverable by the sample, in which cases the warranty of merchantability may be implied.<sup>2</sup> In both description and quality the bulk of the goods must correspond with the sample;<sup>3</sup> but this, when a great mass of goods is sold, will be satisfied by an average correspondence, if the sample fairly represents the aggregate.<sup>4</sup> As will hereafter be seen more fully, showing sample is not necessarily sale by sample;<sup>5</sup> the purchaser may reject if the goods do not correspond with sample,<sup>6</sup> but an average correspondence with sample is sufficient.<sup>7</sup>

§ 226. A false representation may be an estoppel;<sup>8</sup> and so may be a warranty when made with intent that it should be acted on.<sup>9</sup>

Representation may be an estoppel.

§ 227. When a buyer shows that he relies on his own judgment, and takes no express warranty, and invites no opinion from the seller, then a warranty will not be implied.<sup>10</sup> It is otherwise when reliance is placed on the seller's statements, if he be an expert in reference to the thing sold.<sup>11</sup> But generally a warranty is not to be stretched to cover patent defects, open to the buyer,<sup>12</sup>

No warranty when buyer depends on his own judgment.

<sup>1</sup> *Infra*, §§ 916-18; Leake, 2d ed. 408; Benj. on Sales, 3d Am. ed. § 667; *Mody v. Gregson*, L. R. 4 Ex. 49; *Dickson v. Zizinia*, 10 C. B. 602.

<sup>2</sup> *Mody v. Gregson*, L. R. 4 Ex. 49; *Fraley v. Bispham*, 10 Penn. St. 320.

<sup>3</sup> *Infra*, § 914; *Azemar v. Casello*, L. R. 2 C. P. 677; *Henshaw v. Robins*, 9 Met. 86; *Brower v. Lewis*, 19 Barb. 574; *Moses v. Mead*, 1 Denio, 378; *Hargons v. Stone*, 5 N. Y. 73; *Borrekens v. Bevan*, 3 Rawle, 37; *Boyd v. Wilson*, 83 Penn. St. 319, where, however, it was held that a sale by sample does not warrant quality, but merely similarity with sample, and merchantability.

<sup>4</sup> *Leonard v. Fowler*, 44 N. Y. 289. That in sample sales there should be opportunity of inspection, see *infra*, §§ 505, 916.

<sup>5</sup> *Infra*, § 915.

<sup>6</sup> *Infra*, §§ 914 *et seq.*

<sup>7</sup> *Infra*, § 917.

<sup>8</sup> *Infra*, § 234.

<sup>9</sup> *Infra*, § 237.

<sup>10</sup> *Supra*, § 224; *infra*, §§ 245, 907; *Chanter v. Hopkins*, 4 M. & W. 402; *Dounce v. Dow*, 64 N. Y. 411; *Lord v. Grow*, 39 Penn. St. 88; *Cogel v. Knisley*, 89 Ill. 598; see *Hight v. Bacon*, 126 Mass. 10, cited *infra*, § 907. As to suppression of defects by vendor, see *infra*, § 250.

<sup>11</sup> *Infra*, §§ 245, 250; *Bragg v. Morrill*, 49 Vt. 45; *Hoe v. Sanborn*, 21 N. Y. 552; *Bartlett v. Hoppert*, 34 N. Y. 118. See *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*; *Nye v. Alcohol Works*, 51 Iowa, 129.

<sup>12</sup> *Infra*, § 907; *supra*, § 224; *Dyer v. Hargrave*, 10 Ves. 505; *Margetson v. Wright*, 5 M. & P. 606; 7 Bing. 603.

and examined by him,<sup>1</sup> though it is otherwise as to matters which the buyer is incapable, from ignorance or infirmity, of distinguishing; or which escaped his notice;<sup>2</sup> or as to which he is misled.<sup>3</sup> Nor is a buyer bound to investigate that which is warranted. He is entitled to take the seller's warranty as relieving him, unless in cases of patent and glaring defect, from examination.<sup>4</sup> But it is otherwise when the false statement is an appeal to investigation, and not a warranty of a fact.<sup>5</sup>

§ 228. Even where there is no warranty, a person selling an article so negligently made by him as to do injury,<sup>6</sup> or of whose dangerous properties he, as seller, ought to be cognizant,<sup>7</sup> is liable in a suit for negligence; though there is no such liability on the part of a vendor, even though he be the manufacturer, to a party injured by the thing sold, where there is no contractual relation between the plaintiff and the defendant, or the plaintiff was not within the defendant's contemplation as the person to use the thing sold.<sup>8</sup>

§ 229. A sale of an article "with all faults" excludes the hypothesis of warranty, and relieves the seller from liability,

<sup>1</sup> *Infra*, §§ 245, 907.

<sup>2</sup> *Infra*, § 245; Story on Cont. § 1057; citing Butterfield v. Burroughs, 1 Salk. 211.

<sup>3</sup> *Infra*, § 245.

<sup>4</sup> Benj. on Sales, 3d Am. ed. § 618; Shepherd v. Kain, 5 B. & Ald. 240; Henshaw v. Robins, 9 Met. 89; Mead v. Bunn, 32 N. Y. 273; Thorne v. Prentiss, 83 Ill. 99; Ruff v. Jarrett, 94 Ill. 475; and cases cited *supra*, § 224; *infra*, § 245.

<sup>5</sup> *Supra*, § 224; *infra*, § 245.

<sup>6</sup> Benj. on Sales, 3d Am. ed. §§ 431, 904; George v. Skivington, L. R. 5 Exch. 1. See note to Chandeler v. Lopus, 1 Smith's L. C. 7th Am. ed. 299; and see *infra*, §§ 1043 *et seq.*

<sup>7</sup> *Infra*, § 241; Benj. on Sales, §§ 431, 668; Langridge v. Levy, 2 M. & W. 519; 4 M. & W. 337; Francis v.

Cockrell, L. R. 5 Q. B. 184; Farrant v. Barnes, 11 C. B. N. S. 553; Hayes v. Porter, 22 Me. 371; Davidson v. Nichols, 11 Allen, 519; Wellington v. Downer Co., 104 Mass. 64; Norton v. Sewall, 106 Mass. 143; Thomas v. Winchester, 6 N. Y. 397.

<sup>8</sup> Cattle v. Stockton Water Works, L. R. 10 Q. B. 453; Loop v. Litchfield, 42 N. Y. 351; Losee v. Clute, 51 N. Y. 494. See comments in Wh. on Neg. §§ 91, 92, 440, 441, 443, 774, 857. That none but a party can sue on a contract, see *infra*, § 784. In Langridge v. Levy, the representation of soundness (the case being that of a gun which burst) was made to the plaintiff's father, but it was understood at the time that the gun was for the plaintiff's use. See distinction put in Coughtry v. Globe Woollen Co., 56 N. Y. 124.



unless there be fraud or unless there be want of adaptation to the purpose of the sale.<sup>1</sup> And it has been held by the House of Lords, that a sale "with all faults" not only covers secret faults, such as might be consistent with the article being merchantable, but protects the seller in case of a sale of animals which turn out to be unfit for the market in consequence of a contagious disease.<sup>2</sup> The identity of the article, however, must be preserved.<sup>3</sup>

Sale "with all faults" excludes warranty.

§ 230. The prevalent opinion in the United States is, that there is a warranty of title in all cases of executory sales, when the owner of goods sells them while in his possession or in his agent's possession as his own, even though there be no affirmation of title.<sup>4</sup> "It is also," says Mr. Benjamin,<sup>5</sup> "universally conceded, that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel is his is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale. But it has been said, thirdly, that in the absence of such implication, and where no express warranty is given, the vendor, by the mere

Warranty of title implied in sale.

<sup>1</sup> Benj. on Sales, 3d Am. ed. §§ 447, 602, 671; *Schneider v. Heath*, 3 Camp. 506; *Baglehole v. Walters*, 3 Camp. 154; *Taylor v. Bullen*, 5 Ex. 779.

<sup>2</sup> *Ward v. Hobbs*, L. R. 4 App. Cas. 13, reversing L. R. 2 Q. B. D. 331, and aff. S. C. 3 Q. B. D. 150; see *Shepherd v. Kain*, 5 B. & Ald. 240. In *Ward v. Hobbs*, Lord Cairns, in his judgment, held that as the suit was on the warranty, no fraud being alleged, the warranty must be proved as a matter of contract, and that a contract of warranty was excluded by the statement that there was to be no warranty. See *supra*, § 222.

<sup>3</sup> *Whitney v. Boardman*, 118 Mass. 247.

<sup>4</sup> Benj. on Sales, 3d Am. ed. §§ 627, 630; *Story on Cont.* § 1062; *Thurston v. Spratt*, 52 Me. 202; *Sargent v. Cur-*

*rier*, 49 N. H. 310; *Sherman v. Trans. Co.*, 31 Vt. 162; *Coolidge v. Brigham*, 1 Met. 551; *Shattuck v. Green*, 104 Mass. 42; *Hoe v. Sanborn*, 21 N. Y. 552; *McCoy v. Archer*, 3 Barb. 323; *Burt v. Dewey*, 40 N. Y. 283; *McKnight v. Devlin*, 52 N. Y. 399; *Dorsey v. Jackman*, 1 S. & R. 42; *Boyd v. Bopst*, 2 Dall. 91; *McCabe v. Morehead*, 1 W. & S. 513; *Charnley v. Dulles*, 8 W. & S. 353; *Darst v. Brockway*, 11 Ohio, 462; *Eagan v. Call*, 34 Penn. St. 236; *Whitaker v. Eastwick*, 75 Penn. St. 229; *Rice v. Forsyth*, 41 Md. 389; *Byrnside v. Burdett*, 15 W. Va. 702; *Williamson v. Simmons*, 34 Ala. 691; *Storm v. Smith*, 43 Miss. 497; *Marshall v. Duke*, 51 Ind. 62; *Morris v. Thompson*, 85 Ill. 16; *Chancellor v. Wiggins*, 4 B. Mon. 201.

<sup>5</sup> Sales, 3d Am. ed. § 627.

sale of a chattel, does not warrant his title and ability to sell; though all again admit, fourthly, that if in such case the vendor *knew* he had no title, and concealed that fact from the buyer, he would be liable on the ground of *fraud*." On the other hand, no such warranty is held to exist when the thing sold is not in the possession of the vendor or of his agent.<sup>1</sup>—

<sup>1</sup> Kent's Com. ii. p. 278; *Huntington v. Hall*, 36 Me. 501; *Emerson v. Brigham*, 10 Mass. 202; *McCoy v. Archer*, 3 Barb. 323; *Edick v. Crim*, 10 Barb. 447; *Scranton v. Clark*, 39 N. Y. 220; *Andres v. Lee*, 1 Dev. & Bat. Eq. 318; *Fletcher v. Drath*, 66 Mo. 126; *Stephens v. Ells*, 65 Mo. 456; *Long v. Hickingbottom*, 28 Miss. 772. This distinction, however, is repudiated in *Eichholz v. Banister*, 17 C. B. N. S. 708, and *Morley v. Attenborough*, 3 Ex. 500, in *Purves v. Rayer*, 9 Price, 488, and in *Story on Cont.* § 1062, where it is stoutly contested, citing *Hammond v. Allen*, 2 Sumn. 394; 11 Pet. 71; *Smith v. Fairbanks*, 7 Foster, 521; *Strong v. Barnes*, 11 Vt. 221; *Coolidge v. Brigham*, 1 Met. 551; *Defreeze v. Trumper*, 1 Johns. 274; *Swett v. Colgate*, 20 Johns. 202; *Ritchie v. Summers*, 3 Yeates, 531; *Willing v. Peters*, 12 S. & R. 177; *Mockbee v. Gardner*, 2 Har. & G. 177; *Payne v. Rodden*, 4 Bibb, 304. See notes to *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*

In *People's Bank v. Kurtz*, 11 Weekly Notes, 226, Sup. Ct. Penn. 1882, it was held that while the vendor of stock in his own possession warrants his own title, he does not warrant that the stock was not part of a fraudulent overissue. "It may now," said Sharswood, C. J., "be regarded as well settled, that a party selling as his own, personal property of which he is in possession, warrants the title to the thing sold; and that if by reason of a defect of title nothing passes, the purchaser may recover back his money, though there be

no fraud or warranty on the part of the vendor. This doctrine is held to apply to choses in action, as well as other descriptions of personal property (*Charnley v. Dulles*, 8 W. & S. 353).

"Shares of stock in a corporation are choses in action, giving a right to dividends and an interest in the capital. The certificate is the evidence of such ownership, and there can be no doubt that if the certificate is forged, or the holder is not such *bona fide*, so that he has no claim on the corporation, the vendor would be liable to his vendee on the implied warranty of title. His possession of the certificate would be as to his vendee possession of the stock, just as possession of a bond or note is possession of the debt which they represent. Where, however, there has been a fraudulent overissue of stock, evidenced by certificate under the genuine seal of the corporation, the case presented is somewhat different. It has been well settled that a corporation is liable to *bona fide* holders of such fraudulent certificates, because, like individuals, they are responsible for the fraudulent exercise of the power intrusted by them to their officers or agents. It is unnecessary in this case to consider whether they are bound to permit a transfer on their books, and to deliver a new certificate to the *bona fide* vendee. It may be that where the overissue is in excess of the amount authorized by the charter, they would not be. But it seems to be established, upon principle as well as authority, that the *bona fide* holder of such a

“The one controverted question,” according to Mr. Benjamin, “is thus narrowed to this point whether in the sale of a chattel

fraudulent certificate would have a right of action against the corporation, and that his measure of damages would be the market value of his stock at the time the transfer was demanded (*Willis v. Philada. & Darby R. R. Co.*, 6 W. N. C. 461, and cases cited in the opinion of Judge Hare). The vendor of such a certificate has then a title which he can transfer, and a remedy against the corporation. Suppose the shares in the case before us had been transferred by an original subscriber, his vendee would have been in the same position as the assignee of shares subsequently issued in excess of the charter. He would have had a clear right to demand a transfer and new certificate. Such certificate, however, would have been worth to him only the value of the stock in the market at the time. If his transfer had been refused, he would be entitled to the same remedy and the same measure of damages. The vendor of shares of stock certainly does not warrant the solvency of the corporation. Corporations are especially liable to be made insolvent by the embezzlement and frauds of their agents or officers. It matters not whether the loss arises from robbery or embezzlement, or by the fraudulent issue of stock, the value of the stock is depreciated. It matters not whether such fraud or robbery was before or after the sale of the stock, the *bona fide* vendor cannot, under the rule in question, be held responsible for the depreciation in value. It is one of the risks which are assumed by all dealers in such securities. It is agreed in the case stated that ‘the certificates were in the usual form and regular on their face, and were issued by the duly constituted officers of the company, and

were sealed with the genuine seal of the corporation.’ We are of opinion that the implied warranty of title extended no further, and that there was no breach.”

That on a sale of bonds by telegraph there is a warranty of genuineness, see *Donaldson v. Newman*, 9 Mo. Ap. 235. That on a sale of accounts there is an implied warranty that they are due, see *Gilchrist v. Hilliard*, 53 Vt. 592.

“In this state,” said Ray, J., in a case before the Supreme Court of Missouri in 1881, “the principle is well settled, that the purchaser of land, who has taken a conveyance with covenants of title, or a bond for such a conveyance, and is placed and continues in the undisturbed and undisputed possession thereof, will not be relieved against the payment of the purchase-money, on the mere ground of defect of title; there being no fraud or false representations as to the title, and no eviction. In all such cases he cannot resist the payment of the purchase-money, without offering to restore the possession, thus acquired by him, to the vendor. *Mitchell v. McMullen*, 59 Mo. 252; *Harvey v. Morris*, 63 Ib. 475; *Wheeler v. Standley*, 50 Ib. 509; *Connor v. Eddy*, 25 Ib. 72; *Smith v. Busby*, 15 Ib. 393. It is equally well settled, in this state, that a purchaser who has paid for land may, where the paramount title is outstanding, maintain an action against his vendor for a breach of his covenant of warranty, without an actual eviction: ‘That is, an actual dispossession, by process of law, consequent upon a judgment, is not necessary, in order that a covenantee may maintain an action for breach of the covenant of warranty.

an innocent vendor, by the mere act of sale, asserts that he is owner. . . . The negative is stated to be the true rule of

In all such cases, however, of voluntary dispossession, or "*ouster in pais*," where there has been no judgment, the burden of proof is upon the covenantee to establish the adverse paramount title to which he has yielded; and the possession should only be surrendered after claim or demand made therefor.' *Morgan v. R. R. Co.*, 63 Mo. 129, and cases cited. Such also seems to be the law in other states, in like controversies, between vendees and vendors of real estate. *Whitney v. Lewis*, 21 Wend. 131; *Lamerson v. Marvin*, 8 Barb. 1; *Estabrook v. Smith*, 6 Gray, 572; *Greenvault v. Davis*, 4 Hill, 643; *Fowler v. Poling*, 6 Barb. 165; *Hamilton v. Cutts*, 4 Mass. 349. It may be remarked, however, that the implied warranty of title, upon the sale of personal property, has been held by the authorities to be analogous to a covenant for quiet enjoyment, in the sale of lands; and it would seem, from these authorities, that the courts do not maintain a different rule in actions based on a breach of warranty of title, on the sale of personal property, than is adopted in a like action in the sale of real estate. *McGiffin v. Baird*, 62 N. Y. 331; *Bardewell v. Colie*, 1 Lans. 145, 146; *Sweetman v. Prince*, 26 N. Y. 232, 233; *Stringham v. Ins. Co.*, 40 N. Y. 285, 286; *Matheny v. Mason*, 12 Rep. 627."

As sustaining the rule that "as to goods in possession of the vendor there is an implied warranty of title," the learned American editor of *Benjamin on Sales* (§ 641) cites, in addition to cases given above, *Eldridge v. Wadleigh*, 3 Fairf. 372; *Huntington v. Hall*, 36 Me. 501; *Dorr v. Fisher*, 1 Cush. 273; *Bennett v. Bartlett*, 6 Cush. 225; *Vibbard v. Johnson*, 19 Johns.

78; *Sweet v. Colgate*, 20 Johns. 196; *Hoe v. Sanborn*, 21 N. Y. 552; *Payne v. Rodden*, 4 Bibb, 304; *Gookin v. Graham*, 5 Hump. 484; *Inge v. Bond*, 3 Hawks, 101; *Colcock v. Goode*, 3 McCord, 513; *Cozzins v. Whitaker*, 3 St. & P. 322; *Williamson v. Sammens*, 34 Ala. 691. But even where the vendor is out of possession at the time of the sale, there has been held to be an implied warranty, unless the goods were held adversely and known to be so by the purchaser. *Smith v. Fairbanks*, 7 Fost. 521.

In *Morley v. Attenborough*, Parke, B., said: "From the authorities in our law, to which may be added the opinion of the late Lord Ch. J. Tindal in *Ormrod v. Huth*, 14 M. & W. 664, it would seem that there is no implied warranty of title on sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it by declaration or conduct; and the question, in each case where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved, as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and, without proof of such usage, the very nature of the trade may be enough to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons." "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to

law on this point in recent text-books of deservedly high repute.<sup>1</sup> Blackstone, however, gives the contrary rule,<sup>2</sup> 'if the vendor sells them as his own.' But the authority mainly relied on by the learned authors mentioned in the note is the elaborate opinion given by Parke, B., in the case of *Morley v. Attenborough*,<sup>3</sup> where the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case. It is, however, the fact," says Mr. Benjamin (1881), "that no direct decision has ever been given in England to the effect, that where a man sells a chattel he does not thereby warrant the title." He adds that there have been repeated references to the *dicta* of Parke, B., on this point, and that dissatisfaction with them has been more than once suggested. This conclusion he sustains by a critical examination of the English cases.<sup>4</sup>—The question is virtually one of burden of proof. Where chattels are sold, it is maintained on the one side that a warranty of title is implied, unless it be shown from the facts of the case that this never was intended; while it is maintained, on the other side, that no warranty is implied, unless it is shown to have been intended

keep the goods purchased. . . . But in the case now under consideration, the defendant can be made responsible only as on a sale of a forfeited pledge, *eo nomine*."

<sup>1</sup> Chit. on Cont. 414, 9th ed.; Broom's Leg. Max. 766, 4th ed.; Leake on Cont. 198; 2 Tayl. on Ev. 997; Bullen & Leake, Prec. of Pl. 229; 6 Co. Lit. 102*a*, cited Benj. on Sales, § 628.

<sup>2</sup> 2 Bl. Com. 451.

<sup>3</sup> 3 Ex. 500.

<sup>4</sup> As is said by the learned American editors of Smith's Leading Cases (i. 307, 7th ed.), "in the recent case of *Eichholz v. Banister*, 17 C. B. N. S. 708, *Morley v. Attenborough* was qualified if not overruled."—"The policy of the common law seems to have been to limit the effect of a sale to the transfer of the right of property from the vendor to the purchaser, and to throw the risk of the

transaction on the latter, unless he had expressly stipulated that it should be borne by the former. No warranty of quality or title was consequently implied from the sale either of personal or real estate." 1 Smith's Lead. Cas. 7th Am. ed. 307, citing *Howland v. Doyle*, 5 R. I. 33, where Ames, J., said: "There is no warranty of title, any more than of quality, implied from the mere fact of the sale of a chattel, the rule of *caveat emptor* applying to both." But the learned editors add: "It is notwithstanding generally held in the United States that the sale of chattels implies a warranty, unless the circumstances are such as to give rise to a contrary presumption, as where the vendor merely sells such right as he has, without either having or undertaking to give actual or constructive possession."

from the facts of the case. Now it is hard to conceive of any sale of chattels in which there does not transpire some fact either implying or disclaiming title. The question, therefore, is dependent upon the construction of particular contracts of sale. But so far as the distinction before us goes to assert that the mere fact that goods sold by a party are not at the time of the sale in his possession, or in the possession of an agent, implies a disclaimer of title, it cannot be sustained on principle. If such a sale is for a full consideration, an affirmation of title is implied.<sup>1</sup> And it is admitted on all sides that such warranty is excluded in all cases in which it is inconsistent with the attitude of the vendor at the time of the sale. When that attitude is such as to utter the warning *caveat emptor*, then *caveat emptor* is the rule.<sup>2</sup> Hence, there is no warranty of title by a pawnbroker;<sup>3</sup> nor by an officer selling under an execution;<sup>4</sup> nor in sales in bankruptcy.<sup>5</sup> But there is a warranty of title in an exchange of articles actually or constructively in possession of the parties exchanging.<sup>6</sup>—Specific performance, it should be added, will not be enforced if there be a failure of title, and a contract of sale will be set aside on ground of mistake when there is no title to sell.<sup>7</sup>—A covenant to convey lands binds to give a good title.<sup>8</sup>

The Roman law on this topic is thus succinctly stated by Windscheid, one of the most authoritative of recent German commentators.<sup>9</sup> The vendor is liable in case of the purchaser's

<sup>1</sup> Such appears to have been Chancellor Kent's ultimate view, as given in the fourth and later editions, of the passage above cited. See, also, 11 Law Rep. 272; 12 Am. Jur. 311; Benjamin on Sales, § 628; Leake, 2d ed. 402.

<sup>2</sup> *Purvis v. Rayer*, 9 Price, 488; *McCoy v. Archer*, 3 Barb. 323; *Rodriguez v. Habersham*, 1 Spears, 314.

<sup>3</sup> *Morley v. Attenborough*, 3 Ex. 512; *Eichholz v. Banister*, 17 C. B. N. S. 708.

<sup>4</sup> *Chapman v. Speller*, 14 Q. B. 621; *Bagueley v. Hawley*, L. R. 2 C. P. 625; *Baker v. Arnot*, 67 N. Y. 448; *Bashore v. Wister*, 3 Watts, 490; *Hicks v. Skinner*, 71 N. C. 539; *Mech. Sav. Inst. v.*

*O'Connor*, 29 Oh. St. 651; *Fore v. McKenzie*, 58 Ala. 115; *Hensley v. Baker*, 10 Mo. 157.

<sup>5</sup> *Moser v. Hoch*, 3 Barr, 230.

<sup>6</sup> *Patee v. Pelton*, 48 Vt. 182; *Hunt v. Sackett*, 31 Mich. 18; *Byrnside v. Burdett*, 15 W. Va. 702; cited Benj. 3d Am. ed. § 641.

<sup>7</sup> 1 Story's Eq. Jur. §§ 143 a, 161, 778, 779; *Graham v. Oliver*, 3 Beav. 124.

<sup>8</sup> *Rawle on Cov.* 565; *Hill v. Hobart*, 16 Me. 170; *Little v. Peddleford*, 13 N. H. 167; *Carter v. Alexander*, 71 Mo. 585.

<sup>9</sup> *Pand.* § 391.

eviction (*Entwehrung*), that is to say, he is liable to the purchaser in case the latter loses the goods from the vendor's defective title. The vendor is obliged to secure to the purchaser not only momentary but permanent possession: *praestare emtori rem habere licere*.

1. The purchaser must lose the thing on account of defective title. It is not enough if he loses it on other grounds, *e. g.*, by its destruction, or its seizure by the state, or by a third person through violence. When the eviction is by judicial process, then the claim against the vendor is complete, though the vendor may subsequently contest it by showing that the judgment was wrongful and collusive, or had been entered in consequence of the purchaser's negligence.<sup>1</sup> On the other side, it is not necessary that the defect of title should be declared by a judicial decree; if the purchaser voluntarily gives up the property to an adverse litigant, he can recover from the vendor by proving that the claim against him was one which he could not resist. The proper course for the purchaser, in case his title is judicially contested, is to notify the vendor—*litem denuntiare*—who then is entitled to interplead; but a neglect to give this notice does not deprive the purchaser of his right to indemnity should it appear that the vendor's intervention would have led to a different result.

2. The defect of title must be imputable to the vendor.<sup>2</sup>

3. The goods must be actually taken from the purchaser, or he must have been obliged to have made some sacrifice to retain them; "*vel damnatus est litis aestimatione*." It makes no matter what shape the adverse process takes, whether it goes to divest property entire or to impose a lien, provided the purchaser be dispossessed, either in whole or in part.

§ 231. In our own law (modifying in this respect the Roman rule), the preponderance of authority is that to sustain a suit on a warranty of title, there should be an eviction of the vendee.<sup>3</sup> When, however,

To sustain  
suit there  
must be  
eviction.

<sup>1</sup> L. 51, pr. D. de evict.; L. 1, C. de rer. per. iv. 64.

<sup>2</sup> L. 1, C. de peric. (iv. 48); L. 11, pr. D. de evict.

<sup>3</sup> Benj. on Sales, 3d Am. ed. § 627,

where are cited, *Sweetman v. Prince*, 62 Barb. 256; *Krumbhaar v. Birch*, 83

Penn. St. 426; *Linton v. Porter*, 31 Ill. 107; *Gross v. Kierski*, 41 Cal. 111. As

to rule in Kentucky, see *Payne v.*

there is a fraudulent misstatement of title on the part of the vendor, eviction need not be a condition precedent to suit.<sup>1</sup> In Massachusetts, eviction is not a condition precedent to a suit,<sup>2</sup> unless in cases where the third party contesting the title is a bankrupt assignee.<sup>3</sup>

Rodden, 4 Bibb, 304; Chancellor *v.* <sup>2</sup> Grose *v.* Hennessey, 13 Allen, 389; Wiggins, 4 B. Mon. 201; Tipton *v.* Perkins *v.* Whelan, 116 Mass. 542; S. Triplett, 1 Metc. (Ky.) 570; as to P. Dryden *v.* Kellogg, 2 Mo. Ap. 87. Tennessee, see Wood *v.* Cavin, 1 <sup>3</sup> Fogg *v.* Willcut, 1 Cush. 300; Gay Heed, 506. *v.* Kingsley, 11 Allen, 345.

<sup>1</sup> Case *v.* Hall, 24 Wend. 102; Sweetman *v.* Prince, 62 Barb. 256.



## CHAPTER XII.

## FRAUD.

- Fraud is an intentional distortion of the truth, § 232.
- Party defrauded may rescind or sue for damages, § 232 *a*.
- Contracts may be divisible in respect to fraud, § 233.
- False representations may be estoppels, § 234.
- When both parties are involved in fraud, neither can recover, § 235.
- When there is fraudulent misrepresentation, good motives are no defence, § 236.
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- And so of falsity, § 240.
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§ 232. FRAUD is a distortion of the truth with intent to inflict on another pecuniary damage.<sup>1</sup> It makes no matter whether the fraud is expressed in words or in conduct ;<sup>2</sup> nor, if expressed in words, is it necessary that these words should have the fraud unequivocally stamped on them. If the intention is to defraud, and this intention is consummated, the party defrauding is responsible, no matter how ambiguous or equivocal may have been the words he used.<sup>3</sup>—In an oft-quoted passage in the

<sup>1</sup> L. 1, § D. h. t. ; L. 1, § 2 ; L. 7, § 3, 8 ; L. 8, L. 9, § 2 ; L. 37, D. h. t. Bright *v.* Eynon, 1 Burr. 390 ; Foxcroft *v.* Devonshire, 1 W. Bl. 193 ; Mallary *v.* Leach, 35 Vt. 156. See notes to Chandler *v.* Lopus, Smith's L. C. 7th Am. ed. 299 ; Smith *v.* Richards, 13 Pet. 36. Fraud in the Roman law is subjected to the same test as duress : contracts induced by it are not *ipso jure* invalid, but may be invalidated *ope exceptionis*. *Supra*, § 145.

<sup>2</sup> *Infra*, § 248.

<sup>3</sup> Lee *v.* Jones, 17 C. B. N. S. 482 ; 14 C. B. N. S. 386 ; *infra*, § 242 *et seq.* "Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard

whether it is true or false, with the intention that it should be acted on by the complaining party, and actually inducing him to act upon it." Anson, 145.

"Fraud generally includes misrepresentation. Its specific mark is the presence of a dishonest intention on the part of him by whom the representation is made. In this case we have a mistake of one party caused by a representation of the other, which representation is made by deliberate words or conduct with the intention of thereby procuring consent to the contract, and without a belief in its truth." Pollock, 3d ed. 524.

Mr. Bispham (Eq. § 24), following Lord Hardwicke in *Chesterfield v. Jan-*

Digest,<sup>1</sup> we have the following definitions: "Dolum malum Servius quidam ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur et aliud agitur. Labeo autem posse (et) sine simulatione id agi, ut quis circumveniat; posse et sine dolo malo, aliud agi, aliud simulari; sicuti faciant, qui per ejusmodi dissimulationem deserviant, et tuentur vel sua vel aliena. Itaque ipse sic definiit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumvenniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est."<sup>2</sup>—Judge Story tells us,<sup>3</sup> that "it is not easy to give a definition of fraud in the extensive signification in which that term is used in courts of equity; and it has been said," he adds, "that these courts have, very wisely, never laid down, as a general proposition, what shall constitute fraud." And he quotes a letter in which Lord Hardwicke says: "As to relief against fraud, no invariable rules can be established. Fraud is infinite; and were a court of equity once to lay down rules, how far they would go and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of men's invention would contrive." Judge Story afterwards<sup>4</sup> declares, that "fraud in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly imposed, and are injurious to another, or by

sen, 1 Atk. 301, 2 Ves. 125, divides fraud as follows: "1. Fraud arising from facts and circumstances of imposition; 2. Fraud arising from the intrinsic matter of the bargain itself; 3. Fraud presumed from the circumstances and condition of the parties contracting; 4. Fraud affecting third parties not parties to the transaction." He declares (§ 197), that "while the general signification of this word (fraud) is easily understood, and, indeed, requires no explanation, it is, nevertheless, difficult to give any satisfactory definition of it in a single

sentence, for the simple reason, that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress."

<sup>1</sup> L. L. § 2, D. IV. 3.

<sup>2</sup> In Story's Contracts, § 620, following this, fraud is defined to be "every kind of artifice employed by one person for the purpose of deceiving another."

<sup>3</sup> Eq. Jur. 12th ed. § 186.

<sup>4</sup> § 187.

which an undue and unconscientious advantage is taken of another." This substantially agrees with the position above taken, that fraud is a distortion of the truth with intent to inflict on another pecuniary damage. To make such fraud the basis, however, of a civil suit, some pecuniary injury must be actually inflicted;<sup>1</sup> though this is not necessary to sustain a criminal prosecution for an attempt.<sup>2</sup>

§ 232 a. A party induced by another's fraud to make a bargain, may elect either to rescind the bargain, or may sue the offending party on a false warranty, or in an action in the nature of deceit. The remedy of rescission is hereafter distinctively discussed.<sup>3</sup> So far as concerns an action for damages based on fraud, it is proper in the first place to observe that no such action lies for an *honest* misrepresentation, though in such case a contract induced by such misrepresentation may be rescinded.<sup>4</sup> To sustain an action for damages caused by another's fraudulent conduct, falsity and fraud must be proved,<sup>5</sup> and there must be a causal relation between the fraud and the injury sustained.<sup>6</sup> The distinguishing features of fraud of this class are discussed in detail in succeeding sections;<sup>7</sup> it is sufficient now to say that a plaintiff is entitled to damages when he can show that he innocently suffered material injury from an intentional distortion of truth by the defendant or his agents,<sup>8</sup> and, as we will hereafter see, a reckless misstatement of a matter of which the party speaking is ignorant imposes lia-

Party defrauded may rescind or sue for damages.

<sup>1</sup> *Infra*, § 242.

<sup>2</sup> Fraud is definable much more by the effect it produces than by the features which it exhibits, varying as they do with each case. When, by the intentional misrepresentation of one party, the mind of the other is so perverted that there is no meeting of intentions on one and the same object, then the party by whom the wrong is attempted will not be permitted to avail himself of it by means of a formal contract the other party may have been induced to execute. *Knelkamp v. Hidding*, 31 Wis. 503.

<sup>3</sup> *Infra*, §§ 282 *et seq.*

<sup>4</sup> *Supra*, § 214.

<sup>5</sup> *Infra*, §§ 239, 240.

<sup>6</sup> *Infra*, § 242.

<sup>7</sup> See *infra*, §§ 244 *et seq.*

<sup>8</sup> See cases cited *infra*, §§ 236 *et seq.*; *Teague v. Irwin*, 127 Mass. 217; *Spence v. Baldwin*, 59 How. Pr. 375; *Crosland v. Hall*, 33 N. J. Eq. 111; *Mechanics' Bank v. Man. Co.*, 33 N. J. Eq. 486; *Buschmann v. Codd*, 52 Md. 202; *Clement v. Boone*, 5 Ill. Ap. 109; *Wynne v. Allen*, 7 Baxt. 312; *Watson v. Crandall*, 7 Mo. Ap. 133.

bility as much as does a fraudulent misrepresentation.<sup>1</sup> Such an action lies on oral fraudulent representations to induce a purchaser to buy property which the statute of frauds requires to be conveyed in writing.<sup>2</sup>—The fraud must be causally related to the injury.<sup>3</sup>—If after opportunity of inspection the purchase is made, there being no fraud to divert attention, this bars the remedy.<sup>4</sup>

§ 233. A contract may be divisible so that while one part of it may be infected by fraud (*dolus incidens*), the remainder may be valid and binding; and, in such case, by the Roman law, the *exceptio doli* applies only to the part that is fraudulent. The same rule is adopted in our own law.<sup>5</sup> This distinction, however, does not apply when the fraud goes to material features of the contract (*dolus causam dans*), in which case the defence applies to the contract as a whole.<sup>6</sup> It has been held, therefore, that a contract whose consideration is in part illegal is void only as to the illegal consideration.<sup>7</sup> And where a party agrees in the same document to sell two distinct species of land, each with its specified price, the contract as to one may be rescinded for fraud, while the contract as to the other stands.<sup>8</sup> But, as a general rule, as is elsewhere more fully stated, a party who

Contracts may be divisible in respect to fraud.

<sup>1</sup> *Infra*, § 241; *Cotzhausen v. Simon*, 47 Wis. 103.

<sup>2</sup> *Lamm v. Port Deposit Co.*, 49 Md. 233.

<sup>3</sup> *Infra*, § 242. In *Poland v. Brownell*, Sup. Ct. Mass. 1881, it was held that to maintain an action for deceit in sale of an interest in a stock of goods and business, the plaintiff must prove that he was induced to buy the stock of goods and a share of the business in question by the fraudulent misrepresentation or concealment by the defendant of material facts, and that he suffered damage therefrom.

<sup>4</sup> *Infra*, § 245.

<sup>5</sup> *Johnson v. Johnson*, 3 B. & P. 162; *Goodspeed v. Fuller*, 46 Me. 141; *Rand*

*v. Webber*, 64 Me. 191; *Miner v. Bradley*, 29 Pick. 457; *Clark v. Baker*, 5 Met. 452; *Morse v. Brackett*, 98 Mass. 205; *Bartlett v. Drake*, 100 Mass. 174; *State v. Tasker*, 31 Mo. 445; *Donnell v. Byern*, 69 Mo. 468.

<sup>6</sup> *Koch*, op. cit. § 76; *Herbert v. Ford*, 29 Me. 546; *Garland v. Spencer*, 46 Me. 528; *Rand v. Webber*, 64 Me. 191; *Lynde v. McGregor*, 13 Allen, 172; *Masson v. Bovet*, 1 Denio, 69; *Grant v. Law*, 29 Wis. 99; *Brown v. North*, 21 Mo. 528.

<sup>7</sup> *Bradway's Est.*, 1 Ash. 212; see *infra*, § 338.

<sup>8</sup> *Rand v. Webber*, 64 Me. 191. See *Lord v. French*, 61 Me. 420.

repudiates a contract must do so *in toto*. He cannot appropriate its benefits and get rid of its burdens.<sup>1</sup>

§ 234. A false representation, either by the party himself or his agent, may estop him afterwards from asserting the contrary, and bind him contractually to the position the false representation takes.<sup>2</sup> It will not be necessary for the party suing on such representations to prove their truth. "This is no infringement on the rule of law requiring the best evidence, and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted; for the estoppel professes not to supply the absence of the necessary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted; and so, too, has it been held that an admission, which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose."<sup>3</sup> Hence, a party making a statement which induces another to contract with him is bound by such statement whether true or false.<sup>4</sup> On the other hand, a non-contractual admission, if made under mistake, may be explained or repudiated.<sup>5</sup>

§ 235. When a transaction is fraudulent on both sides, neither party, according to the Roman law, can recover from the other damages for the fraud committed on him individually.<sup>6</sup> It does not follow from this that the contract is *ipso jure* invalid, since, when executed, it cannot be rescinded, and it may convey rights to innocent third parties; all that is declared is that the courts cannot be used by a party implicated to enforce for his benefit a contract fraudulently concocted; this view has been settled by repeated adjudications of our courts.<sup>7</sup>

<sup>1</sup> See *infra*, §§ 338, 511, 552, 899.

<sup>2</sup> See for mistakes of negligent estoppel, *supra*, § 202 *a*, and generally, *infra*, §§ 1043 *et seq.*

<sup>3</sup> 2 Sm. L. C. 693; 3 Wh. on Ev. § 1075-8.

<sup>4</sup> *Cave v. Mills*, 7 H. & N. 913; *Jor-*

*den v. Money*, 5 H. of L. C. 185; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; Wh. on Ev. § 145.

<sup>5</sup> See Wh. on Ev. § 1088, for authorities.

<sup>6</sup> L. 36 D. h. t., Koch, § 76.

<sup>7</sup> *Infra*, § 340.

Hence a contract between two parties to defraud a third party, cannot be enforced by either of the contracting parties.<sup>1</sup> "No one is allowed to set up his own fraud or criminality, to defeat an innocent party, but when both parties are *participes criminis*, the fraud may be set up and proved by either party, when the unexecuted portion of the contract is sought to be enforced against him."<sup>2</sup> "A court of equity will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of doing that which is illegal; and where such a contract has been executed by one of the parties by conveying real estate, a court of equity will not, in general, interfere, but will leave the title to the property where the parties have placed it."<sup>3</sup> The rule, however, does not preclude a dupe or victim from obtaining redress for a wrong sustained, though he was nominally party to the wrong.<sup>4</sup>—A fraudulent conveyance to defeat creditors, while bad as against the creditors may bind the parties.<sup>5</sup>

§ 236. When false representations are knowingly made, and are operative in inducing the party imposed upon to agree to a contract, it is no defence that the party using the misrepresentation was influenced by good motives.<sup>6</sup> Were it otherwise, there could in no case be any liability for fraudulent representation, since there are no fraudulent representations whose

When there is fraudulent misrepresentation, good motives are no defence.

<sup>1</sup> Jones v. Yates, 9 B. & C. 532; Deady v. Harrison, 1 Stark. 50; Robinson v. McDonnell, 2 B. & Ald. 134; Clay v. Ray, 17 C. B. (N. S.) 188; Randall v. Howard, 2 Black, 585; Ayer v. Hewett, 19 Me. 281; Taylor v. Weld, 5 Mass. 116; Nellis v. Clark, 20 Wend. 124; Kisterbock's App., 51 Penn. St. 483; Bixler v. Saylor, 68 Penn. St. 146; Lynch's App., 97 Penn. St. 349; Gondy v. Gebhart, 1 Oh. St. 262; Bradford v. Byers, 17 Oh. St. 396; McQuade v. Rosencrans, 36 Oh. St. 442; Boston v. Balch, 69 Mo. 115; Hoover v. Pierce, 27 Miss. 13.

<sup>2</sup> Boynton, C. J., McQuade v. Rosencrans, 36 Oh. St. 448.

<sup>3</sup> St. Louis, etc. R. R. v. Mathers, 71 Ill. 592; Compton v. Bank, 96 Ill. 367.

<sup>4</sup> *Infra*, § 353.

<sup>5</sup> Bessey v. Windham, 6 Q. B. 166; Robinson v. McDonnell, 2 B. & Ald. 134; Dyer v. Homer, 22 Pick. 253; Reichart v. Castator, 5 Binn. 109; Jackson v. Garnsey, 16 John. 189; Sherk v. Endress, 3 W. & S. 255; Worth v. Northam, 4 Ired. L. 102; Dearman v. Ratcliffe, 5 Ala. 192; and other cases cited 2 Ch. on Cont. 11th ed. 1038.

<sup>6</sup> See this topic discussed in Wh. Cr. L. 8th ed. § 119.

making the maker does not excuse to himself by some meritorious pretext. But "it is fraud in law if a party makes representations which he knows to be false and injury ensues, although the motives from which the representations proceeded may not have been bad."<sup>1</sup> . . . A party is liable to an action for deceit, therefore, if by an intentional misstatement he leads another party to contract with him, no matter how firmly he may have believed the matter would ultimately be made right.<sup>2</sup> And the coöperation of other motives constitutes no excuse.<sup>3</sup> The same rule applies to fraudulent representations whereby assent to a contract is obtained. If a party making a false representation is aware of its falsity, if he knows that the other party assented to his proposal because he gave it this particular shape, and would not have assented had it not been for this false representation, it is no defence to him to show that in some remote day the transaction would be profitable to the party assenting.<sup>4</sup>

§ 237. The causal relation, however, in suits of this class for fraud, is limited to parties whom the defrauding party intended to affect by his fraud.<sup>5</sup> A manufacturer who sends out into the market goods with false brands, is not liable to the vendees of his vendees, however liable he might be to indictment for the special statutory offence of false branding. If every purchaser could sue everybody, no matter how remote, who made deceptive statements about the goods purchased, every person who was concerned in producing or selling such goods, no matter in what rudimental stage, would be liable to every person who should buy such goods, no matter in what stage of transformation. But fraud—*dolus*—to be the subject of redress, must have been directed especially to the party

False representation must have been with intent to be acted on by party injured.

<sup>1</sup> Tindal, C. J., *Foster v. Charles*, 7 Bing. 105, adopted by Knight Bruce,

V. C., *Gibson v. d'Este*, 2 Y. & C. 572.

<sup>2</sup> Polhill v. Walter, 3 B. & Ad. 114.

<sup>3</sup> Reynell v. Sprye, 1 D. M. G. 708; Hough v. Richardson, 3 Story, 659; Matthews v. Bliss, 22 Pick. 48; Turnbull v. Gadsden, 2 Strobb. Eq. 14;

Smith v. Mitchell, 6 Ga. 458.

<sup>4</sup> Peck v. Gurney, L. R. 6 H. L. 409; see Murray v. Mann, 2 Exch. 538.

<sup>5</sup> Smith's case, L. R. 2 Ch. 616; Collins v. Evans, 5 Q. B. 820; Behn v. Kemble, 7 C. B. N. S. 260; Mahurin v. Harding, 28 N. H. 128; Case v. Boughton, 11 Wend. 106; *infra*, § 237.



seeking redress. Hence it has been held that the directors of a company who would have been liable to original allottees of shares for fraudulent representations contained in a prospectus issued by them<sup>1</sup> were not liable to subsequent vendees of such shares.<sup>2</sup> "Every man," so the limitation is stated by Wood, V. C.,<sup>3</sup> "must be held liable for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." The furthest extension of which this liability is susceptible, is where goods are sold to one party, under false representation, for another's use. Hence the vendor of a gun, who sold it for the use of the plaintiff and his sons, falsely representing it to be "good, safe, and secure," and of a particular make, is liable, in an action of deceit, brought by one of the sons who was injured by the gun's explosion.<sup>4</sup> And it may be laid down as a general rule that it is incumbent on a party claiming that he has suffered by another's false statements, to prove that these false statements were made by the party charged with the intention that he should act upon them.<sup>5</sup> At the same time it is not necessary, as has been seen, that the false representation should have been made directly to the party injured. It is enough if the party making the representation should know that it is to be communicated to the party to be injured.<sup>6</sup>

<sup>1</sup> *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Cazeaux v. Mali*, 25 Barb. 583.

<sup>2</sup> *Peck v. Gurney*, L. R. 6 H. L. C. 377; see *Wells v. Cook*, 16 Oh. St. 67, cited *Wald's Pollock*, 505. Mr. Pollock cites *Way v. Hearn*, 13 C. B. N. S. 292, as sustaining *Peck v. Gurney*, which case expressly overrules *Bedford v. Bagshaw*, 4 H. & N. 538; *Bagshaw v. Seymour*, 18 C. B. 903.

<sup>3</sup> *Barry v. Croskey*, 2 J. & H. 1, adopted in *Anson*, 152.

<sup>4</sup> *Langridge v. Levy*, 2 M. & W. 519; see *Proctor v. McCall*, 2 Bailey, 298. But the limitation of *Peck v. Gurney*,

L. R. 6 H. L. C. 377, is not adopted to its full extent in this country; see *New Y. & N. H. R. R. v. Schuyler*, 34 N. Y. 30; *Phelps v. Wait*, 30 N. Y. 78; *Bruff v. Mali*, 36 N. Y. 200; *Suydam v. Moore*, 8 Barb. 358; *supra*, § 228.

<sup>5</sup> *Pasley v. Freeman*, 3 T. R. 51; *Tapp v. Lee*, 3 B. & P. 367; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105, and cases cited in *Bigelow's Lead. Cas. Torts*, 1; see *Fitzsimmons v. Joslin*, 21 Vt. 129, where *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 336, is criticized.

<sup>6</sup> *Ibid.*; *Barden v. Keverberg*, 2 M. & W. 63; *Pilmore v. Hood*, 5 Bing. N. C.

§ 238. It is not necessary, to impose liability for a fraudulent misrepresentation, or to avoid a contract induced by it, that it should have been made for the purpose of gaining a pecuniary benefit. It is enough if it be uttered for the purpose of defrauding the party injured.<sup>1</sup> Hence that it should include an intention to benefit the party making the representation is not essential to constitute liability.<sup>2</sup>

§ 239. When the question of fraudulent intention is material, such intention is to be proved inductively. No man who is about to cheat proclaims his intention, and even if he did this would not close the matter, as an avowal of an intention to cheat would in most cases be regarded as merely a cheating avowal. The intention must be proved inductively from all the circumstances of the case. And whatever facts go to logically prove or dis-

97; Crocker v. Lewis, 3 Sumn. 8; Bruff v. Mali, 36 N. Y. 200; Bartholomew v. Bentley, 15 Ohio, 660.

In Bank of Montreal v. Thayer, 2 McCrary, 1, the receiver of a railroad executed and placed upon the market certain certificates payable to A. or bearer, which contained upon their face certain false representations, intended to deceive whoever might purchase the same. It was held that a bona fide purchaser, before maturity and without notice, relying upon such fraudulent representations, might recover in an action for damages, although such receiver had no purpose to defraud and deceive such specific purchaser when he executed the said certificates. It was further ruled that the fact that the payee A. participated in the fraud would not relieve the maker from liability, nor render it necessary that such payee should be joined in the action as a party defendant. It was also held that the representations contained in such certifi-

cates were not warranties upon which an action could be maintained by the purchaser. See notes to Chandelier v. Lopus, 1 Smith L. C. 7th Am. ed. 239 et seq.; as to parties, see *infra*, § 781 et seq.

<sup>1</sup> 2 Kent, Com. 489; Story on Cont. § 642; Pasley v. Freeman, 3 T. R. 51; Foster v. Charles, 6 Bing. 396; Stiles v. White, 11 Met. 356; Collins v. Denison, 12 Met. 549; Benton v. Pratt, 2 Wend. 385; Allen v. Addington, 7 Wend. 9; Hubbell v. Meigs, 50 N. Y. 480; Young v. Hall, 4 Ga. 95. See, however, *contra*, Wilkin v. Tharp, 55 Iowa, 609.

<sup>2</sup> Foster v. Charles, 6 Bing. 396; 7 Bing. 105; Wilde v. Gibson, 1 H. L. C. 605. That the test is injury to the party defrauded, not gain to the party defrauding, see *infra*, § 243. That a money consideration will not validate a fraudulent deed, see *infra*, § 377 a; Levick v. Brotherline, 74 Penn. St. 149.

prove the hypothesis of fraud are relevant on such an issue.<sup>1</sup> Hence collateral frauds may be proved when part of a system with that under investigation.<sup>2</sup> But system must be first proved to make such evidence admissible.<sup>3</sup>—It is not necessary that fraud, when alleged in a civil issue, should be proved beyond reasonable doubt, even though involving an indictable offence. It will be enough if it is established by preponderance of proof.<sup>4</sup> The burden, however, is on the

<sup>1</sup> Wh. on Ev. § 33; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Tapp v. Lee*, 3 B. & P. 367; *Conant v. Jackson*, 16 Vt. 335; *Collins v. Denison*, 12 Met. 549; *Skinner v. Flint*, 105 Mass. 528; *Horton v. Weiner*, 124 Mass. 92; *Cary v. Hotailing*, 1 Hill, 311; *Hall v. Erwin*, 66 N. Y. 649; *Hubbell v. Meigs*, 50 N. Y. 480; *Livermore v. McNair*, 34 N. J. Eq. 478; *Reed v. Lawton*, 2 Watts, 56; *Boyd v. Browne*, 6 Barr, 310; *Lowry v. Coulter*, 9 Barr, 349; *Garrigues v. Harris*, 17 Penn. St. 344; *Brown v. Shock*, 77 Penn. St. 471; *Battles v. Laudenslager*, 84 Penn. St. 446; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Massey v. Young*, 73 Mo. 269; *O'Donnell v. Segar*, 25 Mich. 367; *Stone v. Wood*, 85 Ill. 603; *White v. White*, 89 Ill. 460; *Brink v. Black*, 77 N. C. 59; *Blackwell v. Cummings*, 68 N. C. 121; *Thorpe v. Thorpe*, 12 S. C. 154; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Nelson v. Wood*, 62 Ala. 175; *Smalley v. Hale*, 37 Mo. 102; *King v. Moon*, 42 Mo. 551; *Hopkins v. Sievert*, 58 Mo. 201; *State v. Merritt*, 70 Mo. 275; *Strong v. Hines*, 35 Miss. 201; *Thompson v. Shannon*, 9 Tex. 536; see *Young v. Hall*, 4 Ga. 95. As to inadequacy of price, see *supra*, § 165. That the question is for the jury, see *McMichael v. McDermott*, 17 Penn. St. 353; *Vallance v. Ins. Co.*, 42 Penn. St. 441; *Ehrisman v. Roberts*, 68 Penn. St. 308.

<sup>2</sup> Wh. on Ev. §§ 28 *et seq.*; *Huntingford v. Massey*, 1 F. & F. 690; *Lincoln v. Claflin*, 7 Wall. 132; *Cragin v. Tarr*, 32 Me. 55; *Knight v. Heath*, 23 N. H. 410; *Pierce v. Hoffmann*, 24 Vt. 524; *Tyson v. Booth*, 100 Mass. 258; *Haskins v. Warren*, 115 Mass. 514; *Waters Co. v. Smith*, 120 Mass. 144; *Horton v. Weiner*, 124 Mass. 92; *Snell v. Moses*, 1 Johns. 96; *Benham v. Cary*, 11 Wend. 83; *Cary v. Hotailing*, 1 Hill, 317; *Hall v. Erwin*, 66 N. Y. 649; *Woods v. Gummert*, 67 Penn. St. 136; *Stewart v. Fenner*, 81 Penn. St. 177; *McAleer v. Horsey*, 35 Md. 439; *Stone v. Wood*, 85 Ill. 603; *Hunter v. Hunter*, 10 W. Va. 321; *Brink v. Black*, 77 N. C. 59; *King v. Moon*, 42 Mo. 551.

<sup>3</sup> *Jordan v. Osgood*, 109 Mass. 457; *Edwards v. Warner*, 35 Conn. 517; *Booth v. Powers*, 56 N. Y. 22, and cases cited Wh. on Ev. § 27; *City Nat. Bk. v. Hamilton*, 34 N. J. Eq. 158; *Livermore v. McNair*, 34 N. J. Eq. 478.

<sup>4</sup> *Infra*, § 338; Wh. on Ev. § 1245; see *Abbey v. Dewey*, 25 Penn. St. 413; *Young v. Edwards*, 72 Penn. St. 257; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Bixby v. Carskadden*, 55 Iowa, 533; *Bullard v. Creditors*, 56 Cal. 600. That this proof should be clear, see *Kain v. Weigley*, 22 Penn. St. 179; *Bentz v. Rockey*, 69 Penn. St. 71.

party setting up fraud.<sup>1</sup>—If a contract is fair and honest when made, it cannot be impugned by proof of subsequent fraudulent intent.<sup>2</sup>

§ 240. Falsity is shown by proving a contradictory opposite, or by establishing a series of conditions inconsistent with the statement alleged to be false, approximating as nearly as possible to an exhaustive exclusion.

And so of  
falsity.

Thus, in order to prove that a particular bank-note is bad, it is enough to show that the bank issuing it is broken; it is not necessary to show that none of the stockholders of the bank, and none of its officers, could on any future contingency be made liable.<sup>3</sup> Knowledge of the falsity, also, on the part of the party taking advantage of it, must be shown in order to sustain an action for deceit.<sup>4</sup> But guilty knowledge in this, as in all other cases where *scienter* is to be proved, is to be inferred from all the circumstances of the case.<sup>5</sup>

§ 241. A party who recklessly states an untruth which he has no probable grounds for believing, and thereby deceives another, is responsible for the deceit, although he had no actual knowledge at the time of the falsity of the statement.<sup>6</sup> Hence, if the directors of a bank “put forth in their reports statements of importance

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<sup>1</sup> Shoemaker v. Kunkle, 5 Watts, 107; Bear's Est., 60 Penn. St. 430; Com. v. R. R., 74 Penn. St. 94.

<sup>2</sup> Grove v. Hodges, 55 Penn. St. 504; Creveling v. Fritts, 34 N. J. Eq. 134.

<sup>3</sup> R. v. Spencer, 3 C. & P. 420; R. v. Evans, Bell C. C. 187; 8 Cox C. C. 257; R. v. Burnside, Bell C. C. 282; 8 Cox C. C. 370; R. v. Byrne, 10 Cox C. C. 369; Com. v. Stone, 4 Met. 43.

<sup>4</sup> Evans v. Collins, 5 Q. B. 805; Ormrod v. Huth, 14 M. & W. 651; Weir v. Bell, L. R. 3 Ex. D. 243; Dickson v. Tel. Co., L. R. 3 C. P. D. 1; R. v. Philpotts, 1 C. & K. 112; R. v. Henderson, 2 Mood. C. C. 192; State v. Blauvelt, 38 N. J. L. 306; Merwin v. Arbuckle, 81 Ill. 501.

<sup>5</sup> Wh. on Ev. § 30. As to presumption of knowledge, see Marsh v. Falker,

40 N. Y. 562. That it is a fraud to aver that a party owns property to a specified amount, suppressing the fact that it is encumbered, see Corbett v. Brown, 8 Bing. 33; 1 Moore & S. 85; see notes to Chandelier v. Lopus, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*

<sup>6</sup> Anson on Cont. 131; Bispham's Eq. § 214; Leake on Cont. 188; Moens v. Hayworth, 10 M. & W. 147; Pulsford v. Richards, 17 Beav. 87; Hine v. Campion, L. R. 7 C. D. 344; R. v. Edward, 3 Russ. on Cr. 1; R. v. Petrie, 1 Leach, 329; R. v. Schlesinger, 10 Q. B. 670; Smith v. Richards, 13 Pet. 26; Bennett v. Judson, 21 N. Y. 238; Marsh v. Falker, 40 N. Y. 562; Hunt v. Moore, 2 Barr, 105; Allen v. Hart, 72 Ill. 104; Converse v. Blumrich, 14 Mich. 109.

in regard to the affairs of the bank, false in themselves, and which they did not believe, *or had no reasonable ground to believe to be true*, that would be a misrepresentation and deceit.”<sup>1</sup> And it has been ruled by Lord Cairns, that parties who recklessly make statements of facts, concerning which they are ignorant, and thereby obtain the confidence of others, are as responsible as they would be if they asserted that which they knew to be untrue.<sup>2</sup> And a statement made “with a reckless ignorance whether it was true or untrue,” to adopt the words of Williams, J.,<sup>3</sup> exposes the party making it to an action for deceit. We may, therefore, hold that when a party recklessly makes statements he does not know to be true, knowledge of their non-truth is to be regarded as notice of their falsity.<sup>1</sup> “The principle applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatived the representation made.”<sup>5</sup> Hence, a rash statement by a party, who once knew the contrary, is a false representation on

<sup>1</sup> Lord Chelmsford, in *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145.

<sup>2</sup> Leake, 2d ed. 371; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64; see *Smith v. Richards*, 13 Pet. 26.

<sup>3</sup> *Behn v. Burgess*, 3 B. & S. 751.

<sup>4</sup> *Wright v. Snowe*, 2 De G. & S. 321; *Taylor v. Ashton*, 11 M. & W. 401; *R. v. Petrie*, 1 Leach, 327; *Hine v. Champion*, L. R. 7 Ch. D. 344; *Evans v. Edmunds*, 3 C. B. 777; *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 79; *Beatty v. Ebney*, L. R. 7 H. L. 102; *Mason v. Crosby*, 1 Wood. & M. 352; *Smith v. Richards*, 13 Pet. 26; *Cabot v. Christie*, 42 Vt. 121; *Hazard v. Irwin*, 18 Pick. 95; *Lobdell v. Baker*, 1 Met. 193; *Fisher v. Mellen*, 103 Mass. 503; *Litchfield v. Hutchinson*, 117 Mass. 95; *Bennett v. Judson*, 21 N. Y.

138; *Indian. R. R. v. Tyng*, 63 N. Y. 653; *Sharp v. Mayor*, 40 Barb. 256; *Taymon v. Mitchell*, 1 Md. Ch. 498; *Stone v. Covell*, 29 Mich. 359; *Beebe v. Knapp*, 28 Mich. 53; *Wilcox v. University*, 32 Iowa, 367; *Frewzel v. Miller*, 37 Ind. 1; *Miner v. Medbury*, 6 Wis. 295; *Turnbull v. Gadsden*, 2 Strob. Eq. 14; *Reese v. Wyman*, 9 Ga. 439; *Elder v. Allison*, 45 Ga. 13; *Read v. Walker*, 18 Ala. 323; *Thompson v. Lea*, 31 Ala. 292; *Glasscock v. Miner*, 11 Mo. 655; *York v. Gregg*, 9 Tex. 85; *Graves v. Bank*, 10 Bush, 23; *Bankhead v. Alloway*, 6 Cold. 56; though see *Merwin v. Arbuckle*, 81 Ill. 501; *Wilcox v. University*, 32 Iowa, 367, cited in *Aldrich's Notes to Auson*, 150; *Cotzhausen v. Simon*, 47 Wis. 103.

<sup>5</sup> *Romilly, M. R., Pulsford v. Richards*, 17 Beav. 87.

which he is liable, although at the time of making it he had forgotten it was untrue.<sup>1</sup> "The affirmation," says Judge Story,<sup>2</sup> "of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false."<sup>3</sup> Hence, the honesty of a misrepresentation, though it may be (there being no recklessness) a defence to an action for deceit, is no defence to a proceeding for rescission.<sup>4</sup>—As we have already seen,<sup>5</sup> it is not necessary, in order to rescind a contract, to prove that the person who obtained it by material false representation knew at the time the representation was made that it was false, or even made it recklessly and without care.<sup>6</sup>

<sup>1</sup> *Burrowes v. Locke*, 10 Ves. 470; *Slim v. Croucher*, 2 Giff. 37; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105; *Taylor v. Ashton*, 11 M. & W. 401. To the same effect see remarks of Wells, J., in *Fisher v. Mellen*, 103 Mass. 506; and see further, *Twitchell v. Bridge*, 42 Vt. 68; *Cabot v. Christie*, 42 Vt. 121; *Savage v. Stevens*, 126 Mass. 207; *Gunby v. Slater*, 44 Md. 237; *Parimlee v. Adolph*, 28 Oh. St. 10; *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283; *Smith v. Mitchell*, 6 Ga. 458. See notes to *Chandler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299.

<sup>2</sup> *Eq. Jur.* 12th ed. § 193.

<sup>3</sup> *Story's Eq. Jur.* 12th ed. § 193, citing *Ainslie v. Medlycott*, 9 Ves. 21; *Pearson v. Morgan*, 2 Bro. Ch. 389; *Taylor v. Ashton*, 11 M. & W. 401.

<sup>4</sup> *Supra*, § 214.

<sup>5</sup> *Supra*, § 214.

<sup>6</sup> *Redgrave v. Hurd*, L. R. 20 Ch. D. 1; cited in detail *supra*, § 214, *infra*, § 245. As will be seen (*infra*, § 1043), an action for negligence can be maintained by a party injured by a negligent erroneous assertion. In *Mathias v. Yetts*, 46 L. T. N. S. 503 (1882), *Jessel, M. R.*, said: "The term legal fraud has a much wider signification. It was defined in the case of *Evans v. Edmonds* (13 C. B. 777, 786), by *Maule*,

J., in a way which has not been questioned, and which has been frequently followed. I may mention especially the late case of *Hart v. Swaine* (L. R. 7 Ch. D. 142), before *Fry, J.*, a decision which, as I read it, was approved of by the House of Lords in *Brownlie v. Campbell* (L. R. 5 Ap. Ca. 925). Therefore, even at law, fraud has a wider signification than that. At law, I take it, it is clear that a man who knew a fact cannot say, if he misstates it, and it is a material fact, that he had forgotten it. It is still fraud at law. If he chooses to take upon himself to state that as true which he ought to have known was not true, you cannot look into his mind to see whether he remembers it or not. It is quite sufficient to know that he did know and ought to have recollected; and, if he chooses after that to state it untruly, he must take the consequences. But the case I have referred to goes further. It says that, if a man takes upon himself to make a material misstatement without inquiry, having the means of ascertaining the truth, it is fraud at law. That is *Evans v. Edmonds*. Equity has gone much further. In equity it never was necessary that there should be what I will call actual

§ 242. There must be a causal relation between the fraud and the injury. Of this the first constituent is, that the party injured should have sustained the injury in consequence of his reliance on the other's fraudulent misstatement; in other words, this fraudulent misstatement should have contributed to induce him to assent to the proposal from which the transaction injurious to him sprang. This need not have been the sole motive;<sup>1</sup> but it must have been a contributory motive, and must have been of such a character that, had its falsity been known, the decision would have been the other way. A fraudulent representation does not avoid a contract that it did not induce; nor, unless it was operative in inducing the opposite party to take steps to his disadvantage, does it expose the party making it to an action for deceit or to a prosecution for obtaining goods under false pretences.<sup>2</sup>—In an English case where this

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or moral fraud. A man who makes a material misstatement innocently, that is, in the sense that he believes it to be true, is not thereby exonerated. We have had that over and over again; and it is hardly necessary to refer to the numerous cases from *The Reese River Silver Mining Co. v. Smith* (L. R. 4 H. of L. 64) downwards, which have established that proposition. It is laid down in the fullest terms in a number of cases; and, as I read that last case of *Brownlie v. Campbell*, it is laid down there also. That being so, there is another point to be considered. It must be no doubt a material misstatement, and the other party must have been induced to act upon it. As it was sometimes said, it must be material to the inducing of the contract, but it need not be the only inducement. If it is a part of the inducement it will do. We had to consider the matter in the appeal court only recently in *Redgrave v. Hurd* (45 L. T. Rep. N. S. 485; 20 Ch. Div. 1). There we said, if a man has a material misstatement

made to him which may, from its nature, induce him to enter into the contract, it is an inference that he is induced to enter into the contract by it."

<sup>1</sup> *Infra*, § 242 *a*; *R. v. Hewsgill*, Dears. 315; *R. v. English*, 12 Cox C. C. 171; *Matthews v. Bliss*, 22 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *McAleer v. Horsey*, 35 Md. 439; *Rogers v. Higgins*, 57 Ill. 244; *Rutherford v. Williams*, 42 Mo. 18; *Winter v. Bandel*, 30 Ark. 362; *Com. v. Coe*, 115 Mass. 481; *Thomas v. People*, 34 N. Y. 351.

<sup>2</sup> *Attwood v. Small*, 6 Cl. & F. 232; *Horsfall v. Thomas*, 1 H. & C. 90; *R. v. Gardner*, 7 Cox C. C. 136; *Collins v. Cave*, 6 H. & N. 131; *R. v. Dale*, 7 C. & P. 352; *Smith v. Kay*, 7 H. L. C. 775; *Traill v. Baring*, 4 D. J. S. 330; *Doggett v. Emerson*, 3 Story, 732; *Mason v. Crosby*, 1 Wood. & M. 342; *Smith v. Richards*, 13 Pet. 26; *Hough v. Richardson*, 3 Story, 659; *Wells v. Waterhouse*, 22 Me. 131; *James v. Hodsdon*, 47 Vt. 127; *Com. v. Davidson*, 1 Cush. 33; *Story v. R. R.*, 24 Conn. 94; *Tay-*

question was mooted,<sup>1</sup> the suit was on a bill of exchange accepted by the defendant, in payment for a cannon sold by the plaintiff to the defendant, which cannon, it was alleged, was worthless, on account of a defect which the plaintiff had endeavored to conceal by the insertion of a metal plug in the weak spot of the cannon. It was proved that the defendant never examined the cannon, and that therefore the plaintiff's conduct in covering up the defect could not have influenced him. The court held that, the deceit, not having been an inducement of the transfer, did not avoid the sale. "If the plug," said Bramwell, B., "which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him." It will be observed that the single issue here was whether the bargain was avoided by this particular deceit; and as the bargain was not induced by the deceit, the deceit did not avoid it.<sup>2</sup>—Where fraud which induces a pur-

1 *or v. Guest*, 58 N. Y. 262; *Morris Canal Co. v. Everett*, 9 Paige, 168; *Addington v. Allen*, 11 Wend. 374; *People v. Miller*, 2 Park. C. R. 197; *Bruce v. Burr*, 67 N. Y. 237; *State v. Tomlin*, 5 Dutch. 14; *Phipps v. Buckman*, 30 Penn. St. 401; *Burkholder v. Beetens*, 65 Penn. St. 496; *Weist v. Grant*, 71 Penn. St. 95; *Ely v. Stewart*, 2 Md. 408; *Central Bank v. Copeland*, 18 Md. 305; *Percival v. Harger*, 40 Iowa, 286; *Young v. Hall*, 4 Ga. 95; *Bryan v. Osborne*, 61 Ga. 51; *Todd v. Fambro*, 62 Ga. 664; *Duncan v. Hogue*, 24 Miss. 671; *Morrison v. Lods*, 39 Cal. 381; *Purdy v. Bullard*, 41 Cal. 444; *Kloppenstein v. Mulcahy*, 4 Nev. 296. To the effect that fraud, to be the basis of litigation, should succeed in defrauding, see further *Neville v. Wilkinson*, 11 Bro. Ch. 546; *Small v. Attwood*, 1 Young, 407; 6 Cl. & F. 232; *Teague v. Irwin*, 127 Mass. 217; *Vandewalker v. Osmer*, 65 Barb. 556; *Bacon v. Bronson*, 7 Johns. Ch. 201; *Duffany v. Ferguson*, 66 N. Y. 482; *Miller v. Barber*, 66 N. Y. 558; *Marsh v. Cook*, 32 N. J. Eq. 262; *Clark v. Everhardt*, 63 Penn. St. 347; *Gunby v. Sluter*, 44 Md. 237; *Bowman v. Carithers*, 40 Ind. 90; *Hale v. Philbrick*, 47 Iowa, 217; *Noel v. Horton*, 50 Iowa, 687; *Bond v. Ramsey*, 89 Ill. 29; *Schwabacker v. Riddle*, 99 Ill. 343; *Turnbull v. Gadsden*, 2 Strobb. Eq. 14; *Tobin v. Bell*, 61 Ala. 125; *Winter v. Bandel*, 30 Ark. 362; *Dunn v. Remington*, 9 Neb. 82; and see *Poland v. Brownell*, cited *supra*, § 232. That the fraud must have preceded damage, see *supra*, § 239.

<sup>1</sup> *Horsfall v. Thomas*, 1 H. & C. 90 (see criticism in Anson, 152).

<sup>2</sup> See remarks of Cockburn, C. J., in *Smith v. Hughes*, L. R. 6 Q. B. 605. That the party injured must have been deceived by the false statement, see further *Bispham's Eq.* § 215; *Hough v. Richardson*, 3 Story, 659; *Veasey v. Doton*, 3 Allen, 380; *Connersville v. Wadleigh*, 7 Blackf. 102; *Tuck v.*



chase is proved, the sale will be set aside; as where a grantor orally agrees upon a sale of land at a specific price by the acre, and warrants the quantity at a specific figure, and the deed is made out with such a covenant, and the covenant is then fraudulently erased by the grantor, and the deed is then delivered to the grantee, who is deceived into the belief that the deed contains that covenant. In such a case, equity will intervene and direct a rectification.<sup>1</sup>

§ 242 *a*. It is not a sufficient reply, that a part of the representations made by the party charged were true. No body of representations can be wholly false; and, in fact, there is no single representation that has not in it some element of truth. "Where a party has induced another to act on the faith of several representations made to him, any one of which he has made fraudulently, he cannot set up the transaction by showing that every other representation was truly and honestly made."<sup>2</sup> "It is not sufficient for him to show that there were other representations or inducements in operation, without further proving that the agreement was due to them only, to the entire exclusion of the false representation."<sup>3</sup>

§ 243. There must be proof, also, in cases of this class, that injury was actually sustained.<sup>4</sup> It is, therefore, not enough that there should be a mere exposure to loss, if no loss has accrued,<sup>5</sup> though it is enough

Fraud need not be sole motive.

Injury must be actually sustained.

Downing, 76 Ill. 71; *Attwood v. Small*, 6 Cl. & F. 232; *Traill v. Baring*, 4 D. J. S. 318; *Percival v. Harger*, 40 Iowa, 286; *Hall v. Thompson*, 1 Sm. & M. 443; *Clopton v. Cozart*, 13 Sm. & M. 363.

<sup>1</sup> *Metcalf v. Putnam*, 9 Allen, 97; *Story's Eq. Jur.* 12th ed. §§ 113, 120, 138 *et seq.*

<sup>2</sup> *Cranworth, L. J., in Reynell v. Sprye*, 1 De G. M. & G. 656; *Wh. Cr. L.* 8th ed. § 1176.

<sup>3</sup> *Leake*, 2d ed. 379, citing *Turner, L. J., Nicol's case*, 3 D. & J. 387; and see to same effect *Clarke v. Dixon*, 6 C. B. N. S. 453; *Smith v. Kay*, 7 H. L.

*Cas.* 750; *R. v. Hewgill*, *Dears.* 315; *R. v. English*, 12 Cox C. C. 171; *State v. Mills*, 17 Me. 211; *State v. Dunlap*, 24 Me. 77; *Com. v. Coe*, 115 Mass. 481; *People v. Haynes*, 14 Wend. 546; *Thomas v. People*, 34 N. Y. 351; *Morgan v. Skiddy*, 62 N. Y. 319; *Shaw v. Stines*, 8 Bosw. 157; *State v. Thatcher*, 35 N. J. L. 445.

<sup>4</sup> See cases cited to last section.

<sup>5</sup> *Hemingway v. Hamilton*, 4 M. & W. 115; *Freeman v. Venner*, 120 Mass. 424; see *Bradley v. Fuller*, 118 Mass. 239; *Abbey v. Dewey*, 25 Penn. St. 413; *Servis v. Cooper*, 4 Vroom, 68.

if a party has been induced by the defendant's fraud to give a security not yet paid,<sup>1</sup> or to give a higher price than would otherwise have been given.<sup>2</sup> But where no damage appreciable in law is sustained, no causal relation between fraud and injury is established.<sup>3</sup> *A fortiori*, a false statement not made until after the bargain is consummated does not expose the party making it to liability.<sup>4</sup> Loss to the party defrauded, not gain to the party defrauding, is the criterion.<sup>5</sup> Inducing a party, therefore, by arts not in themselves criminal to pay a debt justly due by him is not actionable.<sup>6</sup>

§ 244. Hence, as a general rule, applicable to all cases of false representation, it may be added, that where the false statement is not believed by the party to whom it is made, or even if believed, is not the consideration of the bargain, the party making it is not chargeable with deceit.<sup>7</sup> Thus, Barnum, to take an illustration from a recent German writer,<sup>8</sup> announced some years ago "Washington's nurse" as a show, and the part was personated by an old negress named Joyce Heath. She was not really Washington's nurse, and if the statement had been believed, there was no concurrence of minds as to the thing the visitor paid to see. But the statement was not believed; or, if it was believed, it was not the consideration of going to

The losing party must believe the false statement.

<sup>1</sup> Hubbard v. Briggs, 31 N. Y. 518.

<sup>2</sup> Kerr, F. & M. 73; Reese River Mining Co., L. R. 3 Ch. App. 611; Hallows v. Fernie, L. R. 3 Eq. 536; Nowlan v. Cain, 3 Allen, 263; Smith v. Countryman, 30 N. Y. 655; Melendy v. Keen, 89 Ill. 395.

<sup>3</sup> Bigelow on Fraud, 86-7; Foster v. Charles, 6 Bing. 396; Clarke v. White, 12 Pet. 178; Morgan v. Bliss, 2 Mass. 112; Fuller v. Hodgdon, 25 Me. 243; Hutchins v. Hutchins, 7 Hill, 104; Dung v. Parker, 52 N. Y. 494; Ely v. Stewart, 2 Md. 408; Marr's App., 78 Penn. St. 69; Meyer v. Yesser, 32 Ind. 294; Smith v. Brittenham, 98 Ill. 188; Missouri Valley Co. v. Bushnell, 11 Neb. 193; Cunningham v. Shields, 4

Hayw. 44; Farrar v. Alston, 1 Dev. 69; Bailey v. Smock, 61 Mo. 213.

<sup>4</sup> State v. Church, 43 Conn. 471; State v. Vanderbilt, 3 Dutch. 328; State v. Tomlin, 5 Dutch. 14; Fulton v. Lofts, 63 N. C. 393.

<sup>5</sup> Wells, J., Fisher v. Mellen, 103 Mass. 505; and see Benj. on Sales, 3d Am. ed. § 429, citing Hanson v. Edgerly, 29 N. H. 354; Milliken v. Thorn-dike, 106 Mass. 385; Phipps v. Buckman, 30 Penn. St. 402; Bartlett v. Blaine, 83 Ill. 25; see *supra*, § 238; notes to Chandeler v. Lopus, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*

<sup>6</sup> Brown v. Blunt, 73 Me.

<sup>7</sup> See *supra*, § 212; Howell v. Biddlecomb, 62 Barb. 131.

<sup>8</sup> Merkel, Abhandlungen, *etc.*

the show. That consideration was the desire for amusement, not obtaining some particular thing. In other words, there must be a causal relation, as has been already stated, between the false statement and the loss.<sup>1</sup> But when fraudulent statements are shown to have been made by one party, to have been acted on by the other party, the burden will be on the former to show that those statements were not believed by the latter.<sup>2</sup> On the other hand, when the statement is one which the party to whom it is made has at hand the immediate means of testing, he cannot, if he does not obtain an express warranty as a substitute for inspection, recover, if he neglects to use such means. In such case the false pretence must be looked upon as an appeal rather than a statement.<sup>3</sup> This rule applies to sales of real as well as to sales of personal property. Where, for instance, in a New York case in 1880, a purchaser under an oral agreement to convey was entitled to a deed with covenants of warranty, but after paying the price of the land, and demanding and being refused a warranty deed, accepted a deed without a warranty, holding after inquiries of his own that the title was good, it was held that in the absence of proof of fraud, he was not entitled to relief on account of a subsequently discovered incumbrance.<sup>4</sup>

§ 245. It has been said that a false representation, to impose liability on its maker, must have been calculated to impose on a person of ordinary sagacity. But this limitation cannot be sustained, as persons

And must be without immediate means of

<sup>1</sup> See *supra*, § 242.

<sup>2</sup> *Hammatt v. Mason*, 27 Me. 308; *Holbrook v. Burt*, 22 Pick. 546; though see *Taylor v. Guest*, 58 N. Y. 262; *Taylor v. Fleet*, 1 Barb. 471; *Hunt v. Moore*, 2 Barr, 108; *Boyd v. Browne*, 6 Barr, 310.

<sup>3</sup> *Vigers v. Pike*, 8 Cl. & F. 650; *Clapham v. Shillito*, 7 Beav. 149; *Aberaman Works v. Wickens*, L. R. Ch. Ap. 101; S. C. L. R. 5 Ex. 485; *Slaughter v. Gerson*, 13 Wal. 379; *Warner v. Daniels*, 1 Wood. & M. 90; *Hoitt v. Holcomb*, 32 N. H. 185; Com. v. Norton, 11 Allen, 266; *Mooney v.*

*Miller*, 102 Mass. 220; *Dickinson v. Lee*, 106 Mass. 557; *Brown v. Leach*, 107 Mass. 367; *Long v. Warren*, 68 N. Y. 426; *Fulton v. Hood*, 34 Penn. St. 365; *Ely v. Stewart*, 2 Md. 408; *Wright v. Gully*, 28 Ind. 475; *Clodfelter v. Hulett*, 72 Ind. 137; *Saunders v. Hattermann*, 2 Ired. 32; *Moore v. Turbeville*, 2 Bibb, 602; *Lythe v. Bird*, 3 Jones, N. C. 222; *State v. Young*, 76 N. C. 258.

<sup>4</sup> *Whittemore v. Farrington*, 76 N. Y. 452; see *Lynch v. Rinaldo*, 58 How. N. Y. Pr. 133.

testing: contributory negligence. of less than ordinary sagacity are as much entitled to be sheltered from swindlers as are persons of greater shrewdness.<sup>1</sup> Hence, if a party is really imposed upon, and has not in fact negligently exposed himself to imposition, he can obtain redress if damaged by fraudulent representations whose unreality a person of greater intelligence would have promptly discovered.<sup>2</sup> But when the facilities of testing the truth of an opinion (*e. g.*, as to coal on land) are equally open to both parties, then, though a misstatement of opinion may preclude the party making it from enforcing the contract,<sup>3</sup> yet the contract will not be rescinded on application of the party to whom the misstatement was made.<sup>4</sup> And this is the case with regard to the misrepresentation of the legal effect of a deed when the other party has the same opportunity of inspecting the deed as the party making the statement,<sup>5</sup> and with regard to other misrepresentations whose accuracy the party imposed on has ample means at the time of testing.<sup>6</sup>

<sup>1</sup> As to undue influence, see *supra*, §§ 157 *et seq.*

<sup>2</sup> *Trower v. Newcome*, 3 Meriv. 704; *R. v. Wickham*, 10 Ad. & E. 34; *Fenton v. Brown*, 14 Ves. 144; *R. v. Woolley*, 1 Den. C. C. 559; *R. v. English*, 12 Cox C. C. 171; *Upton v. Englehardt*, 3 Dill. 496; *Slaughter v. Gerson*, 13 Wall. 379; *Mead v. Bunn*, 32 N. Y. 275; *Sherwood v. Salmon*, 2 Day, 128; *Com. v. Henry*, 22 Penn. St. 255; *Smither v. Calvert*, 44 Ind. 242; *Mattlock v. Todd*, 19 Ind. 130; *Swimm v. Bush*, 123 Mich. 99; *Starkweather v. Benjamin*, 32 Mich. 305; *Walsh v. Hall*, 66 N. C. 233; *Roseman v. Canovan*, 43 Cal. 111; *Juzan v. Toulmin*, 9 Ala. 662; *Oswald v. McGehee*, 28 Miss. 340; *Wannell v. Kem*, 57 Mo. 478. That the fact of the falsity of a statement of title could be shown by examining the record does not protect the party making it, see *David v. Park*, 103 Mass. 501; *Upsham v. Debow*, 7 Bush, 442; *Bailey v. Smock*, 61 Mo. 213; *Kiefer v. Rogers*, 19 Minn.

32. That the mental inferiority of the person acted on is to be taken into consideration in examining the question whether the fraud caused the contract, see *Osmond v. Fitzroy*, 3 P. Wms. 130; *Farnam v. Brooks*, 9 Pick. 212; *Seaver v. Phelps*, 11 Pick. 304; *Grant v. Thompson*, 4 Conn. 204; *Rice v. Peel*, 15 Johns. 303; and see *supra*, §§ 159, 196; *infra*, §§ 259, 572, 753.

<sup>3</sup> *The Distilled Spirits*, 11 Wall. 356; *Brown v. Leach*, 107 Mass. 364; *Fisher v. Worrall*, 5 W. & S. 478; *Rockafellow v. Baker*, 41 Penn. St. 319.

<sup>4</sup> *Infra*, § 282; *Watts v. Cummings*, 59 Penn. St. 91; *Cummings's App.*, 67 Penn. St. 404; *Lynch's App.*, 97 Penn. St. 349.

<sup>5</sup> *Upton v. Englehardt*, 3 Dill. 496; *Smither v. Calvert*, 44 Ind. 242; see *supra*, § 198, *infra*, §§ 259, 572, 753, for other cases.

<sup>6</sup> *Attwood v. Small*, 6 C. & F. 232; *Mason v. Ditchbourne*, 1 M. & R. 460; *Vigers v. Pike*, 8 Cl. & F. 650; *Warner*

But where the vendor's agent took the purchaser to land which was the subject of negotiation, and pointed out to the purchaser, as an inducement to purchase, certain improvements which the vendor knew did not go with the property, he cannot, so it was held in Iowa in 1880, defend himself, when the question of the validity of the sale comes up, on the ground that the purchaser should have made inquiries on his own account.<sup>1</sup> And where the plaintiff was induced to buy an estate in another state by representations from the defendant as to the situation of the estate and the character of the improvements on it, the defendant, before execution of the deeds, saying that he had never seen the estate, it was held in Massachusetts in 1880 that the plaintiff was not precluded from recovery, on a suit for deceit, by the fact that he did not visit the estate until after the papers were executed.<sup>2</sup> But if it should appear that the party injured assented to the bargain after independent investigations of his own as to the matter falsely represented, then the inference may be that he was influenced, in coming to a conclusion, not by the misstatement, but by his own observations.<sup>3</sup>—This exception does not apply in cases where the party so inquiring is misled in his inquiries by the fraud of the other party,<sup>4</sup> or when his

*v. Daniels*, 1 Wood. & M. 90; *Tuthill v. Babcock*, 2 Wood. & M. 298; *Hoitt v. Holcomb*, 32 N. H. 202; *Veasey v. Doton*, 3 Allen, 380; *Mooney v. Miller*, 102 Mass. 220; *Cooper v. Lovering*, 106 Mass. 77; *Moore v. Turbeville*, 2 Bibb, 602; *Saunders v. Hatterman*, 2 Ired. 32; see *infra*, §§ 259, 753.

In *Poland v. Brownell*, Sup. Ct. Mass. 1881, it was held that a purchaser cannot maintain an action for deceit in the sale of goods if, having ample opportunity to examine the property, he saw fit to rely upon the statement of the seller concerning the value of the thing sold. *Brown v. Castles*, 11 Cush. 350; *Mooney v. Miller*, 102 Mass. 217; *Parker v. Moulton*, 114 id. 99. And this rule was applied in a case where the goods were ex-

posed, and plaintiff relied on his own judgment and that of a friend. See *Gordon v. Parmelee*, 2 Allen, 212; *Pike v. Fay*, 101 Mass. 134. See to same general effect, *Schwabacker v. Riddle*, 99 Ill. 343.

<sup>1</sup> *Carmichael v. Vandebur*, 50 Iowa, 651.

<sup>2</sup> *Savage v. Stevens*, 126 Mass. 207.

<sup>3</sup> *Dyer v. Hargrave*, 10 Ves. 505; *Attwood v. Small*, 6 Cl. & F. 232; *Slaughter v. Gerson*, 13 Wall. 379; *Mead v. Bunn*, 32 N. Y. 275; *Clark v. Everhardt*, 63 Penn. St. 347; *Halls v. Thompson*, 1 Sm. & M. 443; *infra*, §§ 261 *et seq.*, 282.

<sup>4</sup> *Central R. R. v. Kisch*, L. R. 2 H. L. 99; *Warner v. Daniels*, 1 Wood. & M. 90; *Tuthill v. Babcock*, 2 Wood. & M. 298; *Somes v. Skinner*, 16 Mass.

inquiries have been rendered abortive by extrinsic influences, and have been followed by a repetition of the prior fraudulent misrepresentations.<sup>1</sup>—When a false representation is proved

348; *Watson v. Atwood*, 25 Conn. 313; *Mead v. Bunn*, 32 N. Y. 275; *Biggs v. Perkins*, 75 N. C. 397; *Wilder v. De Cow*, 18 Minn. 470; *Phelps v. Quinn*, 1 Bush, 375; *Gant v. Shelton*, 3 B. Mon. 423; *Robertson v. Clarkson*, 9 B. Mon. 507; *Bailey v. Smock*, 61 Mo. 213.

<sup>1</sup> *David v. Park*, 103 Mass. 501; *Risch v. Van Lillienthal*, 34 Wis. 250; see *Manning v. Albee*, 11 Allen, 520; *Brown v. Castles*, 11 Cush. 348; *infra*, §§ 252 *et seq.*, 286.

In *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, where to an action for specific performance the defendant set up negligence on the part of the plaintiff in examining the papers submitted to him (see case cited *supra*, § 214), *Jessel, M. R.*, said: "There is another proposition of law, of very great importance, which I think it is necessary for me to state, because, with great deference to the very learned judge in matters of specific performance from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say: 'If you had used due diligence you would have found out that the report was untrue. You had the means afforded you of discovering its falsity, which you did not choose to avail yourself of.' I take it, it is a settled doctrine of equity, not only as regards specific performance, but also as regards rescission, that that is not an answer, of course subject to the exception of the statute of limitations, when it is made a statutory answer on the ground of delay. That, of course, is a different thing altogether. There

delay deprived a man of his right, and the only question to be considered was from what time the delay should count. It was decided, and is now so made law by statute, that the time counted from the date when, by due diligence, the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities in equity, than that false representation is not got rid of by the defendant—that is, the person resisting its performance, or asking for rescission on the ground of deceit—being guilty of negligence. One of the most familiar instances in modern times, and one which occurs in case after case, both reported and unreported, is this: Men issue a prospectus containing false statements—false statements of the contracts made before the formation of the company, and on similar matters—and then say the contracts themselves may be inspected at the office of the solicitors. It has always been held that those who accept those false statements as true are not deprived of their remedy merely because they neglected to go and look at the contracts themselves, though they were told the contracts were in writing and might be inspected if they asked to see them. Another instance with which we are familiar is a false statement as to the contents of a lease; such a case as a man saying that there was no covenant or provision in the lease to prevent the carrying on, in the house to be sold, the trade which the purchaser was known by the vendor to be desirous of carrying on therein. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it was held

to have been made under circumstances likely to impose, the burden is on the party making the representation to show not only that the other party had independent information, but that he relied on such information, and was not misled by the false representation.<sup>1</sup> And where the owner of a ship, seeking insurance, misrepresented the time of sailing, the insurance based on this representation was held void, though the underwriter could have obtained correct information from Lloyd's list, since the underwriter was supposed to have reason, until the contrary was proved, to rely on the owner's statement.<sup>2</sup>—Even to patent defects warranties may be framed to extend,<sup>3</sup> and when there is nothing in the condition of things glaringly inconsistent with a statement made, a vendee has a right to rely on such statement;<sup>4</sup> and so where the purchaser, relying on the vendor's statements, waives an examination he might have made.<sup>5</sup> Where, also, the vendor

that the vendor could not be allowed to say, 'You were not entitled to give credit to my statement, either by word of mouth or in writing.' It is not sufficient, therefore, to say that a man has had the opportunity of investigating the real state of the case, but has not availed himself of that opportunity. It has been apparently supposed by the learned judge in the court below that the decision of the house of lords in the case of *Attwood v. Small*, 6 Cl. & F. 232, is an authority which conflicts with that proposition. He says the defendant 'inquired into it to a certain extent, and, if he did it carelessly and inefficiently, that is his own fault. As in the case of *Attwood v. Small*, those directors and agents of the company who made ineffectual inquiry into the business which was to be sold to the company were nevertheless held, by their investigation, to have bound the company, so here, I think, the defendant, who made a cursory investigation into the position of things on the 17th of Feb., must be taken to have accepted the statements which

appeared in those papers.' Those are the remarks which are, I think, inaccurate in law; and, what is more, I think they are not borne out by the case to which the learned judge referred." It is further argued that the authority of *Attwood v. Small* was weakened by the fact of the strength of the dissenting minority.

<sup>1</sup> Leake, 2d ed. 381, citing *Torrance v. Bolton*, L. R. 8 Ch. 118; *Bates v. Hewitt*, L. R. 2 Q. B. 595; and see *Holbrook v. Burt*, 22 Pick. 546.

<sup>2</sup> *Morrison v. Ins. Co.*, L. R. 8 Ex. 40.

<sup>3</sup> *Supra*, §§ 227 *et seq.*

<sup>4</sup> *Kerr, F. & M.* 79; *Kisch v. R. R.*, 3 De G. J. & S. 122; *S. C. L. R.* 2 H. L. 99; *Rawlings v. Wickham*, 3 De G. & J. 319; *Smith's case*, L. R. 2 Ch. Ap. 614; *Bean v. Herrick*, 12 Me. 262; *Mead v. Bunn*, 32 N. Y. 275; *Thorne v. Prentiss*, 83 Ill. 99; *Young v. Harris*, 2 Ala. 108.

<sup>5</sup> *Tuthill v. Babcock*, 2 Wood. & M. 299; *Mooney v. Miller*, 102 Mass. 220; *Savage v. Stevens*, 126 Mass. 207; *Long v. Warren*, 68 N. Y. 426; *Nowlin*

misrepresents through mere heedlessness, he may, if the misrepresentation be material, be precluded from specific performance, although a more cautious person than the purchaser might not have been misled.<sup>1</sup>

§ 246. A false statement as to a collateral matter, not entering into the merits of a contract, does not subject the party making it to an action for deceit; nor does it invalidate a contract which it ought not, supposing the other party to have acted with ordinary prudence, to have induced such party to make, or whose making it ought not to have determined.<sup>2</sup> The question of materiality is to be determined by the tests heretofore given.<sup>3</sup> It must be recollected that materiality is always relative. What may be material in one case may be immaterial in another. The question is, adaptability to the purposes of the contract, and whatever touches this adaptability may be said to be material. The standard of discrimination must be that which business men of the same class are accustomed to exercise under similar circumstances. It does not follow that because a party is swayed by whims, therefore, a misstatement as to such whims exposes the party making it to an action for deceit, or taints a contract so induced in such a way as to leave it open to rescission. If a party acts irrationally, he must bear the consequence of his acts; and in addition to this consideration, if we should hold that contracts are vitiated where either party uses untrue expressions of flattery or ingratiation, few contracts would stand. We have, therefore, to fall back on the test of materiality. As to this, it has been held that the burden is on a party making false statements in the course of a negotiation, to prove that they did not exercise a preponderating influence on the other party, so as to rationally induce

*v. Snow*, 40 Mich. 699; *High v. Kistner*, 44 Iowa, 79; *Estell v. Myers*, 54 Miss. 174; see notes to *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299.

<sup>1</sup> *Jones v. Rimmer*, L. R. 14 Ch. D. 588.

<sup>2</sup> Story's Eq. Jur. 12th ed. § 191;

*Neville v. Wilkinson*, 1 Bro. Ch. 546; *Attwood v. Small*, 6 Cl. & F. 232; *Geddes v. Pennington*, 5 Dow. 159; *Vane v. Colbold*, 1 Exch. 798; *Vernon v. Keys*, 12 East, 632; 4 Taunt. 488; a case, however, questioned by Mr. Pollock (Wald's ed. 496).

<sup>3</sup> *Supra*, §§ 180-186 *et seq.*



him to agree to the contract.<sup>1</sup> But this should be confined to pretences on their face likely to have such an influence. Persons engaged in business may use many modes of recommendation, the truth of which would not bear scrutiny; yet the fact that such expressions were used, no matter how false they may have been, would not expose the parties making them to an action for deceit, or invalidate contracts in which the expressions were used. It is otherwise, however, as we have seen, when the representations go to the merits of the contract. If so, it is no answer that other motives contributed to induce the party imposed upon to agree to the contract.<sup>2</sup> And in any view the question of materiality is one of fact, to be determined by all the circumstances of the particular case,<sup>3</sup> subject to the general principle that an immaterial misrepresentation neither avoids a contract nor sustains an action for deceit.<sup>4</sup> And that which ought, under all the circumstances of the case, to have made no difference in the result, cannot be deemed material.<sup>5</sup>

§ 247. Nor is a contracting party bound by the misstatements of a third person, unless agency or confederacy be proved.<sup>6</sup>

<sup>1</sup> Williams's case, L. R. 9 Eq. 225, n.; Kintrea *ex parte*, L. R. 5 Ch. 101.

<sup>2</sup> *Supra*, § 242a; Wald's Pollock, 500, citing Reynell v. Sprye, 1 D. M. G. 708; Hough v. Richardson, 3 Story, 659; Cabot v. Christie, 42 Vt. 121; Matthews v. Bliss, 22 Pick. 48; Camp v. Pulver, 5 Barb. 91. To same effect see Slaughter v. Gerson, 13 Wall. 379; Bowman v. Caruthers, 40 Ind. 90; First Nat. Bank v. Yocum, 11 Neb. 328; Noel v. Horton, 50 Iowa, 687; Elliot v. Boaz, 9 Ala. 772.

<sup>3</sup> Westbury v. Aberdeen, 2 M. & W. 267; Lindenau v. Desborough, 8 B. & C. 586; Hough v. Richardson, 3 Story, 659; McAleer v. Horsey, 35 Md. 439; Printup v. Fort, 40 Ga. 276.

<sup>4</sup> Story's Eq. Jur. 12th ed. § 190; Geddes v. Pennington, 5 Dow. 159; Winch v. Winchester, 1 Ves. & B. 375; Foster v. Charles, 6 Bing. 396; Slaugh-

ter v. Gerson, 13 Wall. 379; Morris Canal Co. v. Emmett, 9 Paige, 168; McAleer v. Horsey, 35 Md. 439; Hall v. Johnson, 41 Mich. 286; Bowman v. Caruthers, 40 Ind. 96; Winston v. Gwathmay, 8 B. Mon. 19.

<sup>5</sup> McAleer v. Horsey, 35 Md. 439; Winston v. Gwathmay, 8 B. Mon. 19.

<sup>6</sup> Pollock, 3d ed. 542, citing Sturge v. Starr, 2 My. & K. 195; Wharton on Agency, § 160; Leake, 2d ed. 386-7; Fairlie v. Hastings, 10 Ves. 126; Thomas v. Roberts, 16 M. & W. 778; Chicago v. Greer, 9 Wall. 726; Ins. Co. v. Mahone, 21 Wall. 152; Goodman v. Eastman, 4 N. H. 458; Root v. French, 13 Wend. 572; Kingsland v. Pryor, 33 Oh. St. 19; Compton v. Bank, 96 Ill. 301; Campbell v. Murray, 62 Ga. 86; Lindsay v. Veasy, 62 Ala. 421; and other cases cited Wh. on Ex. § 1175.

Thus a party effecting a life insurance on the life of another is not prejudiced by such other person's independent false statements, unless concert be established, or such liability is specially imposed by the policy.<sup>1</sup> "There is no case in which a fraud intended by one man shall overturn a fair and *bona fide* contract between two others."<sup>2</sup> A bank, to take another illustration, which discounts notes, is not affected by frauds between the parties to such notes;<sup>3</sup> nor is an assignee in trust affected by a fraud between one of the trustees and a stranger.<sup>4</sup> On the same reasoning the representations of an agent outside of the range of his office, do not bind his principal.<sup>5</sup> And, as a general rule, a false representation, to be imputable, must have been made with intent to be acted on by the party claiming redress.<sup>6</sup>

§ 248. Fraud may be committed as effectually by conduct involving a silent distortion of the truth as by words.<sup>7</sup> A party, for instance, who seeks credit on the basis of being in a particular profession, may, by adopting the dress or other distinctive marks of that profession, assert his connection with it as emphatically as he could by making the claim in words.<sup>8</sup> Silence, also, may be a contractual admission as effectually as speech, when it involves assent to another person's statements.<sup>9</sup> A statement of quality, also, is implied in offering for sale at a particular price. A jeweller who sells a ring, apparently golden,

<sup>1</sup> *Wheeldon v. Hardisty*, 8 E. & B. & G. 387; *Lobdell v. Baker*, 1 Met. 232.

<sup>2</sup> *Buller, J., Master v. Miller*, 4 T. R. 435; *Croyle v. Moses*, 90 Penn. St. 250.

<sup>3</sup> *R. v. Giles*, L. & C. 502; 10 Cox C. C. 44; *R. v. Hunter*, 10 Cox C. C. 642;

<sup>4</sup> *McGuire v. Faber*, 25 Penn. St. 436.

<sup>5</sup> *Infra*, § 270.

<sup>6</sup> *Supra*, § 237; see notes to *Chandler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299.

<sup>7</sup> *Supra*, § 217. In the Roman law, see to this effect L. 43, § 2; L. 66, § 1; D. de contrah. emt. XVIII. 1. So in our own law: *Lee v. Jones*, 17 C. B. N. S. 482; *Crawshay v. Thompson*, 4 M.

<sup>8</sup> *Wh. on Ev.* § 1136. See as to qualification, *infra*, §§ 249 et seq.

at the price of gold, makes the assertion that the ring is of gold as distinctly as if he said, "this is gold."<sup>1</sup> A man, also, who courts a woman in view of marriage, implicitly states that he is an unmarried man capable of marrying.<sup>2</sup> A party, also, procuring the endorsement of another in order to negotiate a bill, is understood to affirm that the person so endorsing is competent to endorse.<sup>3</sup> And when an article is sold for a specific purpose, the suppression by the vendor of a fact that makes it unfit for such purpose may be an actionable deceit.<sup>4</sup> A material latent defect, such is the general rule, in a chattel, must be disclosed when it is offered for sale, or the sale will be avoided;<sup>5</sup> and though there is in a sale of chattels no implied warranty against latent defects,<sup>6</sup> yet a chattel must answer the general object for which it is sold.<sup>7</sup> In fine, "misrepresentations may be as well by deeds or acts as by words; by artifices to mislead as well as by positive assertion."<sup>8</sup>

§ 249. It may happen that all of a statement may be true, yet from the suppression of important qualifications, the effect is to leave a false impression. In this case the imperfect statement of truth is tantamount to a false statement.<sup>9</sup> The mere allowing

When non-disclosure of qualifications leaves a statement

<sup>1</sup> Paddock v. Strobridge, 29 Vt. 470; Winsor v. Lombard, 18 Pick. 57; see Hill v. Gray, 1 Stark. 352; Ward v. Hobbs, L. R. 2 Q. B. D. 331.

<sup>2</sup> Pollock v. Sullivan, 53 Vt. 507; Bennett v. Bean, 42 Mich. 346; cited *supra*, § 217.

<sup>3</sup> "It has been said that the doctrine of equitable estoppel involves a question of legal ethics, Welland Canal v. Hathaway, 8 Wend. 483, and this is repeated in Dezell v. Odell, 3 Hill, 225, and in Frost v. Ins. Co., 5 Denio, 154, and is allowed to prevent fraud and injustice."—Danforth, J., Andrews v. Ins. Co., 85 N. Y. 344.

<sup>4</sup> Lobdell v. Baker, 1 Met. 193.

<sup>5</sup> See *supra*, § 221; *infra*, §§ 254 et seq.

<sup>6</sup> Emmerton v. Matthews, 7 H. & N.

586; Randall v. Newson, L. R. 2 Q. B. D. 102.

<sup>7</sup> Ibid.; Emmerton v. Matthews, 7 H. & N. 586; *supra*, § 224.

<sup>8</sup> *Supra*, § 221; Leake, 2d ed. 360, citing Shepherd v. Kain, 5 B. & Ald. 240.

<sup>9</sup> Story's Eq. Jur. 12th ed. § 192.

<sup>9</sup> *Supra*, § 217; Pidcock v. Bishop, 3 B. & C. 605; Peek v. Gurney, L. R. 6 H. L. 392; Clermont v. Tasburgh, 1 Jac. & W. 112; Mallory v. Leach, 35 Vt. 156; Moore v. Cairns, 116 Mass. 396; Livingston v. Peru Co., 2 Paige, 390; Smith v. Ins. Co., 49 N. Y. 211; Kintzing v. McElrath, 5 Barr, 467; Pearce v. Blackwell, 12 Ired. 49; Rhode v. Alley, 27 Tex. 443; Belden v. Henriquez, 8 Cal. 87.

untrue, this  
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another, also, without setting him right, to proceed on a false impression derived from the conduct of the party taking advantage of the mistake, estops such party from subsequently using this advantage;<sup>1</sup> and the same rule applies where there is an intentional non-correction of an error into which the other party fell from misapprehension of a statement which was originally made without the intention to deceive.<sup>2</sup> This is eminently the case when facts have occurred which have made a former statement, true when originally made, false at the time of a subsequent conversation, when the intermediate occurrence of these facts is suppressed.<sup>3</sup>—It has been held in Massachusetts,<sup>4</sup> where a father, in a letter, recommended his minor son as deserving of credit, but concealed the fact of the son's infancy, that if this concealment was with the view of getting credit for the son, knowing that if the fact of infancy had been disclosed no credit would have been given, this would be a fraud which would impose liability. And it has been ruled in England, that where a lessor of a mine did not disclose the fact that a material portion of the mine was under ground between high and low-water mark, and the lessee had no means of knowing this defect, this was ground for setting aside the lease.<sup>5</sup>—As will be hereafter seen, buying without the intention of paying is a fraud which avoids a contract.<sup>6</sup> But a suppression of the purchaser's insolvency is not such a fraud. Supposing there is an intention to pay, the fact that upon a full survey

<sup>1</sup> *Supra*, § 217; *Hill v. Gray*, 1 Stark. 434; *Keates v. Cadogan*, 10 C. B. 591; *Pickard v. Sears*, 6 A. & E. 474; *Miles v. Furber*, L. R. 8 Q. B. 77; *Connihan v. Thompson*, 111 Mass. 270; *Rice v. Barrett*, 116 Mass. 312; *Bodine v. Killen*, 53 N. Y. 93; *Chapman v. Rase*, 56 N. Y. 137; *Beaupland v. McKeen*, 28 Penn. St. 124.

<sup>2</sup> *Reynell v. Sprye*, 1 D. M. G. 709; *Wald's Pollock*, 492, citing *Davies v. Ins. Co.*, L. R. 8 Ch. D. 475; *Pettigrew v. Chellis*, 41 N. H. 95. To same point see *Barron v. Alexander*, 27 Mo.

530; *Cecil v. Spurger*, 32 Mo. 462; *Patterson v. Kirkland*, 34 Miss. 423, and cases cited *supra*, § 217. See notes to *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299.

<sup>3</sup> *Traill v. Baring*, 33 L. J. C. 521; *Hill v. Gray*, 1 Stark. 352.

<sup>4</sup> *Kidney v. Stoddard*, 7 Met. 252.

<sup>5</sup> *Mostyn v. West Mostyn Coal Co.*, L. R. 1 C. P. D. 145. See to same general effect *Edwards v. McLeay*, Coop. 308; 2 Swanst. 287; *Leake*, 2d ed. 362.

<sup>6</sup> *Infra*, § 258.

of his affairs the purchaser's solvency is questionable, is one he is not required to disclose.<sup>1</sup> It is otherwise, however, if there is any active misleading of the vendor;<sup>2</sup> and for B. to induce A. to accept in B.'s place C., an insolvent tenant, B. knowing and concealing C.'s insolvency, is an actionable deceit on the part of B.<sup>3</sup> The suppression, also, by a vendor of hay, of the fact that it contains deleterious ingredients, makes him liable for any damage to the vendee's cattle.<sup>4</sup>—It has been held in England that a non-disclosure of incumbrances, when the purchaser has no other means of determining the existence of such incumbrances than by the vendor, avoids a contract of sale when the purchaser is misled by the suppression.<sup>5</sup> And this is *a fortiori* the case when there is a negation of the fact suppressed implied in the vendor's statements. Thus, where the vendor of a public house described it as in the occupation of a tenant, without stating that it was under lease to a brewer for a term of eight years to come, specific performance was refused as against a purchaser who had no notice of the lease.<sup>6</sup> But in letting a house, the proposed tenant need not be instructed as to the condition of the repairs; this he must find out himself.<sup>7</sup> A statement, however, as to repairs, subjects the maker to liability.<sup>8</sup> Where, also, there is a registry of incumbrances, which it is the practice for purchasers to search, parties are not called upon to give in detail the burdens

<sup>1</sup> *Irving v. Motley*, 7 Bing. 543; *Litchfield v. Hutchinson*, 117 Mass. 195; *Farrel v. Lloyd*, 69 Penn. St. 239.  
<sup>2</sup> *Biggs v. Barry*, 2 Curt. 259; *Redington v. Roberts*, 25 Vt. 686; *Rowley v. Bigelow*, 12 Pick. 307; *Morrill v. Blackman*, 42 Conn. 324; *Lupin v. Marice*, 6 Wend. 83; *Andrew v. Dieterich*, 14 Wend. 31; *Hennequin v. Naylor*, 24 N. Y. 139; *Rodman v. Thalheimer*, 75 Penn. St. 232; *Talcott v. Henderson*, 31 Oh. St. 162; *Patton v. Campbell*, 70 Ill. 72.  
<sup>3</sup> *Bruce v. Ruler*, 2 Man. & R. 3.  
<sup>4</sup> *French v. Vining*, 102 Mass. 135. As to suppression of facts going to wholesomeness of food, see *supra*, §§ 222, 229.  
<sup>5</sup> *Torrence v. Bolton*, L. R. 8 Ch. 118; *Drysdale v. Mace*, 2 Sm. & G. 225; *Shirley v. Stratton*, 1 Bro. C. C. 440.  
<sup>6</sup> *Caballero v. Henty*, L. R. 9 Ch. 447; *Leake*, 2d ed. 363.

<sup>7</sup> *Keates v. Cadogan*, 10 C. B. 591.  
<sup>8</sup> *Lamare v. Dixon*, L. R. 6 H. L. 414. See notes to *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299; and see also *supra*, § 217.

on their title. It is enough for them to refer either expressly or by implication to the recorded title. But even the fact that an incumbrance is recorded, so that a prudent inquirer would be notified of its existence, does not protect the party suppressing the fact of its existence from an action of deceit, or from the rescinding of the contract induced by the suppression, if the suppression involved in any way an active negation of the existence of the incumbrance.<sup>1</sup>

• § 250. Fraud, as a basis for avoiding a bargain (as distinguished from fraud as a basis for a suit for deceit), involves an error of the party on whom the imposition was effected. There was no consent of two minds to the same thing, therefore, there was no contract. Hence it follows that when there is no distortion of truth, there can be no claim that a contract is void on account of fraud. Mere suppression of information a party may have, no matter how greatly such information might affect the price of the article in which he is dealing, does not affect the validity of a contract he may make concerning it, provided there is no misstatement by him, either express or implied, of facts calculated to mislead the other party.<sup>2</sup> Persons dealing in stocks, for instance, may secure, by peculiar activity and large outlay (as was the case with the Rothschilds during the close of the wars of Napoleon I.), private information of political events calculated to have a great effect on the market; but their non-disclosure of such information will not invalidate any purchase or sale they may make. If all that a vendor of railway stock knows about the stock was to be published before he effected a valid sale, the process of selling by intelligent operators would be so protracted that there would be few sales of railway stock except by persons who keep themselves stupidly ignorant of the securities in which they deal.—“If a vendee has private knowledge,” says Judge Story, “of a declaration of war, or of a treaty of peace, or of other political arrangements (in respect to which men speculate for themselves) which mate-

Non-disclosure of facts which business sagacity would discover does not avoid contract.

<sup>1</sup> *Infra*, § 251.

<sup>2</sup> *Attwood v. Small*, 6 Cl. & F. 232; *supra*, § 246.

rially affect the prices of commodities, he is not bound to disclose the fact to the vendor at the time of his purchase;<sup>1</sup> but, at least in a legal and equitable sense, he may innocently be silent.—For there is no pretence to say that upon such matters men repose confidence in each other, any more than they do in regard to other matters affecting the rise and fall of markets.”<sup>2</sup>

A party doing business is expected to inform himself of whatever ordinary business sagacity could advise him as to such business; and the other party is under no duty to communicate such facts to him.<sup>3</sup>—Chancellor Kent<sup>4</sup> states the law as follows: “When the means of information relative to facts and circumstances affecting the value of the commodity are equally accessible to both parties, and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge, which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract. There is no breach of any implied confidence that one party will not profit by his superior knowledge as to facts and circumstances open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required.

. . . The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information.”<sup>5</sup>—Cicero<sup>6</sup> takes a very high view of the duties, in this respect, of contracting parties, arguing that each party is bound to disclose any special information he may have as to the bargain which the

<sup>1</sup> See on this point, *infra*, § 251.

<sup>4</sup> Com. II. Let. 39.

<sup>2</sup> Story, Eq. Jur. 12th ed. § 149; citing Pothier, *Traité de Vente*, pt. 2, ch. 2; *Abbott v. Dermott*, 34 Ga. 227.

<sup>5</sup> This is adopted by Judge Story, Eq. Jur. 12th ed. § 198. To same general effect, see *Hanson v. Edgerly*, 29 N. H. 343; *Howard v. Gould*, 28 Vt. 523; *Paddock v. Strobridge*, 29 Vt. 470; *Kintzing v. McElrath*, 5 Barr, 467; *Harris v. Tyson*, 24 Penn. St. 347; *Westmoreland v. Dixon*, 4 Hayw. 227.

<sup>3</sup> *Carter v. Boehm*, 1 W. Bl. 593; *Pimm v. Lewis*, 2 F. & F. 778; *Haley v. Ins. Co.*, 12 Gray, 545; *Herring v. Scaggs*, 62 Ala. 180; *Boggs v. Ins. Co.*, 30 Mo. 63; *Lanier v. Auld*, 1 Murph. 138; *Maney v. Porter*, 3 Humph. 347.

<sup>6</sup> *De Off. Lib.* 3, cap. 13.

other party may not possess. "But this statement," so comments Judge Story,<sup>1</sup> "is not borne out by the acknowledged doctrines, either of courts of law or of equity, in a great variety of cases. However correct Cicero's view may be of the duty of every man, in point of morals, to disclose all facts to another with whom he is dealing, which are material to his interests, yet it is by no means true that courts of justice generally, or at least in England and America, undertake the exercise of such a wide and difficult jurisdiction. Thus it has been held by Lord Thurlow (and the case falls precisely within the definition of Cicero of undue concealment), that if A., knowing there to be a mine in the land of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B. for a price which the estate would be worth without considering the mine, the contract would be good; because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases the question is not, whether an advantage has been taken, which, in point of morals, is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but also that there should be some obligation on the party to make the discovery."<sup>2</sup> The right view is thus forcibly stated by President Wayland: "And, in the first place, I would remark that the moral precept respecting veracity is not a positive but merely a negative precept. It does not command us to *bear witness*, it merely forbids us to bear *false witness*. It does not direct us either when or what we shall speak; but it forbids us whenever we do speak, to utter anything except the simple verity. Hence, our duty, in respect to what we shall promulgate, saving only that we must not promulgate falsehood, is entirely unaffected by this command. It will indeed be seen, upon the slightest reflection, that this is the only precept that could have been given on this subject. The mere fact that anything is true is no reason whatever why we should promulgate it. Were

<sup>1</sup> Eq. Jur. 12th ed. § 205.

<sup>1</sup> Wh. & Tu. Eq. L. C. 4th Am. ed.

<sup>2</sup> Fox v. Mackreth, 2 Bro. Ch. 400; 188.



it otherwise, every man would be under obligations to tell every one whom he saw, every thing that he knew. Everything, whether bad or good, must be made a matter of universal publicity. The confidence of the most intimate friendships must be violated as a matter of religious duty. The domestic fireside would cease to be a sanctuary. The tortures of such a situation would be beyond endurance. Every man would flee to solitude as a refuge from society, which had thus become an intolerable nuisance. It being evident, then, that the fact that a thing is true is no reason for promulgating it, we naturally inquire what additional element must be combined, in order to render the promulgation of it obligatory. We answer, if the fact that a thing is true impose no obligation, the obligation must be derived from the general will of God, either expressed in revelation, or inferred from a consideration of the general consequences belonging to each particular case."<sup>1</sup>—What has been said applies equally to an action for deceit. If an illusory agreement has been produced by a designedly false material statement, or by a suppression of material truth amounting to a falsification, then an action of deceit lies against the party stating the falsehood or suppressing the truth. But the truth suppressed, in order to found such an action, must be something the party suppressing was bound to state, and the negation of which his words or his conduct actively implied.<sup>2</sup>—An English case finally decided in 1880<sup>3</sup> may be cited as illustrating the distinctions of the text. The defendant, in defiance of the prohibitions of 32 & 33 Vict. c. 78, sent to market a collection of pigs which, to his knowledge, were infected with a contagious disease; and the pigs were bought by the plaintiff, in whose hands some

<sup>1</sup> The Limitations of Human Responsibility, by Francis Wayland, Boston, 1838; a work as remarkable for strong sense as for true philanthropy.

<sup>2</sup> Ibid. *Smith v. Hughes*, L. R. 6 Q. B. 597; *Peck v. Gurney*, L. R. 6 H. L. 403; *Laidlaw v. Organ*, 2 Wheat. 178; *Hanson v. Edgerly*, 29 N. H. 343; *Foster v. Peyser*, 9 Cush. 242; *Fisher v. Birdlong*, 10 R. I. 525; *Otis v. Ray-*

*mond*, 3 Conn. 413; *Hadley v. Imp. Co.*, 13 Oh. St. 502; *Mitchell v. McDougall*, 62 Ill. 498; *Caples v. Steel*, 7 Oregon, 491; *Van Arsdale v. Howard*, 5 Ala. 596.

<sup>3</sup> *Ward v. Hobbs*, L. R. 3 Q. B. D. 150; reversing S. C., L. R. 2 Q. B. D. 33; and aff. in H. of L., L. R. 4 Ap. C. 13; cited *supra*, §§ 222, 229; and see *Anson*, 146.

of them died, while other pigs belonging to the plaintiff were infected by the disease. The court of queen's bench held that the sending the pigs to the market involved a negation of their being subject to a contagious disease such as that prohibited by the statute. This was reversed by the court of appeal, on the ground that there was no suppression amounting to a negation of a truth, and the judgment of the court of appeal was affirmed in the house of lords.<sup>1</sup>—In an Illinois case in 1880, the evidence was that V. sold to P. one engine from a building which had been damaged by fire. The bed of the engine, which, subsequent to the fire, had been repaired, contained several cracks of which V. was cognizant, but which he did not point out to P., who could have discovered them by inspection. The engine was sold to P. as second-hand. P. employed an engineer to examine it, who did not observe the cracks. It was held that it was not incumbent on V. to inform P. either that the engine had been damaged by fire, or that it was cracked, as there was nothing said by him that involved a negation of these facts.<sup>2</sup>

§ 251. A mere suppression, therefore, must not only be of a material matter, which the other party had no means of discovering, but must relate to a fact which is negated by the active misconduct of the suppressing party. To impose liability on him he must wrongfully do something to imply the contrary of the fact he suppressed.<sup>3</sup> By the tenor of his conduct, such conduct being fraudulently moulded for this purpose, the negation of the suppressed fact must be implied.<sup>4</sup>

Party suppressing must, to be liable, actively negate the fact suppressed.

<sup>1</sup> L. R. 4 Ap. C. 13. It was said by Lord O'Hagan, that the statute above cited was passed for the benefit of the general public, and had nothing to do with the private bargains of individuals.

<sup>2</sup> Cogel v. Kniseley, 89 Ill. 598. As sustaining generally the text, see, in addition to the cases above cited, Price v. Neal, 3 Burr. 1354; Bree v. Holbeck, Doug. 655; Pasley v. Freeman, 3 T. R. 51; Henshaw v. Robins, 9 Met. Mass. 86; Welsh v.

Carter, 1 Wend. 185; Musgrove v. Gibbs, 1 Dall. 217; Levy v. Bank, 4 Dall. 234. There can be no concealment of a fact not known to the party speaking. Spratt v. Ross, 16 Ct. of Sess. 1145.

<sup>3</sup> Ward v. Hobbs, L. R. 3 Q. B. D. 150, reversing S. C., L. R. 2 Q. B. D. 331, and aff. L. R. 4 Ap. Cas. 13, cited *supra*, § 250.

<sup>4</sup> Keats v. Cadogan, 10 C. B. 591; Smith v. Hughes, L. R. 6 Q. B. 597;

§ 252. Nor is a party bound to correct an error into which he sees the other contracting party has fallen, but which he

*Laidlaw v. Organ*, 2 Wheat. 178; *Hanson v. Edgerly*, 29 N. H. 343; *Fisher v. Budlong*, 10 R. I. 527; *Smith v. Countryman*, 30 N. Y. 655; *Taylor v. Fleet*, 4 Barb. 95; *McMichael v. Kilmer*, 76 N. Y. 36; *Donnelly v. State*, 2 Dutch. 601; *Kintzing v. McElrath*, 5 Barr, 467; *Harri v. Tyson*, 24 Penn. St. 347; *McShane v. Hazlehurst*, 50 Md. 107; *Hadley v. Imp. Co.*, 13 Oh. St. 502; *Frenzel v. Miller*, 37 Ind. 1; *Mitchell v. McDougall*, 62 Ill. 498; *Morris v. Thompson*, 85 Ill. 16; *Cogel v. Kniseley*, 89 Ill. 598; *Williams v. Spurr*, 24 Mich. 335.—As illustrations of active concealment, *Mr. Leake* (2d ed. 358) cites *Udell v. Atherton*, 7 H. & N. 172, where a person selling a log of mahogany, turned it so as to conceal a hole, and *Schneider v. Heath*, 3 Camp. 506, where a person sold a vessel with all faults, and before the sale had taken her from the ways on which she lay, and placed her afloat in a dock for the purpose of preventing an examination of the bottom. On the other hand, where a governess had been engaged by a writing in which she was described as a “spinster,” it was held that the agreement was not annulled by the fact that she had been married and divorced. “There is no allegation,” said the court, “of fraud; and short of that, the concealment of a material fact, except in cases of policies of insurance, does not avoid a contract.” *Fletcher v. Krall*, 42 L. J. Q. B. 55.

In *Havemeyer v. Havemeyer*, N. Y. Court of Appeals, in 1881, the facts were as follows: In the close of November 24, 1875, I., who represented plaintiff and others, owners of stock in the L. Railroad Co. (after offering to Q., a rival proprietor of stock, to work in his interest against the defendants, which

offer had been accepted by Q.), called upon defendants, who also owned stock in the same company (the stock owned by defendants and those represented by I. constituting a majority of the stock), and entered into an agreement with defendants, whereby it was agreed that I. might sell a majority of the stock of the company to Q., with whom negotiations for sale had been had by him, which should include all stock represented by him and owned by defendants, at a specified price. The agreement further provided that there should be no separate sale of any of the stock by any of the parties. Of the fact of the prior offer to and acceptance by Q. defendants had no knowledge, I. having concealed it from them. On the 14th of December, 1875, defendants notified I. that they declined further negotiations for the sale of their stock. About the same time they purchased other stock, which, together with what they owned, constituted a majority of the stock, without that represented by I. In January they sold all of their stock to Q., who, having obtained a majority of the stock, refused to purchase more, and thus the stock represented by I. was greatly diminished in value, and had but little salable value. In an action by plaintiffs against defendants for a violation of the agreement, it was ruled that the concealment from the defendants of the offer of I. to Q., and its acceptance by Q., was a sufficient defence to the action. The court cited *Hichens v. Congreve*, 4 Russell, 562; *Blake's case*, 34 Beav. 639; *Foss v. Harbottle*, 2 Hare, 461; *Rawlins v. Wickham*, 3 D. G. & J. 304; *Conkey v. Bond*, 36 N. Y. 428; *Getty v. Devlin*, 54 id. 403; *Getty v. Donnelly*, 9 Hun, 603; *Place v. Min-*

did nothing to promote, and which the other party did not state during the negotiations. V., who has land to sell, for instance, may see that P., a purchaser, is under the impression that the soil has particular properties, which it has not. V., who has done nothing to create this impression, is not bound to volunteer to remove it.<sup>1</sup> P. could readily, if he chose, put questions to V., which would either bring out the truth, or, in case of misstatement, get rid of his bargain. But he does not choose to do this; and V. has a right to suppose that P., in thus proceeding without inquiry, has his own information, which may be after all better than that of V.<sup>2</sup> And, beside this, negotiations would be interminable, if each party was obliged to search for and rectify the other's latent impressions.<sup>3</sup> Of course, if P. says: "The land has certain qualities," etc., and V. assents, this, if the statement is false, is a false representation by V. But unless V. either creates or assents to the misconception, it is not imputable to him.<sup>4</sup> And as a general rule, a purchaser of goods is not bound to communicate to his vendor intelligence of facts which may increase the price of the goods, but which were in the range of business sagacity to discover.<sup>5</sup>

ster, 65 N. Y. 102. As a case of active concealment see *Dameron v. Jamison*, 4 Mo. Ap. 299, and see *Stephens' App.*, 87 Penn. St. 202.

<sup>1</sup> See *Law v. Grant*, 37 Wis. 548.

<sup>2</sup> *Rawle v. Ins. Co.*, 27 N. Y. 282; *Morrison v. Ins. Co.*, 18 Mo. 262; *Keith v. Ins. Co.*, 52 Ill. 518.

<sup>3</sup> See *supra*, § 250.

<sup>4</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597; *Larry v. Sherburne*, 2 Allen, 34; *Donnelly v. State*, 2 Dutch. 601.

<sup>5</sup> *Kintzing v. McElrath*, 5 Barr, 467; *Butler's App.*, 26 Penn. St. 63; *Bartle v. Saunders*, 2 Grant, Penn. 199. Mr. Pollock (3d ed. 527), on the above topic, cites with approval the ruling of the U. S. supreme court in *Laidlaw v. Organ*, 2 Wheat. 178 (declaring it to be almost exactly parallel to *Smith v.*

*Hughes*, L. R. 6 Q. B. 597), which he thus states: "The contract was a sale of tobacco. On the morning of the sale the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England. The sellers asked if there was any news affecting the market price. The buyers gave no answer, and the sellers did not insist on having one, and it was held that the silence of the buyers was not a fraudulent concealment. And, notwithstanding that this decision has been criticized," continues Mr. Pollock, referring to *Story's Eq. Jur.* § 149, "it seems right; for silence in such a case is of itself equivalent at most to saying, 'It is not our business to tell you;' which, indeed, as a part of the general law, the

§ 253. It has just been noticed that a party is not bound to contradict another's unexpressed misconceptions. It may be

other party may be presumed to know already. The real question in such a case is, whether there was nothing beyond mere silence. If there is evidence of any departure from the attitude of passive acquiescence, to that extent there is evidence of fraud; and perhaps it is not too much to say that the court should be astute to find it." And Mr. Pollock adds in a note that the conclusion of the supreme court, as above given, is in effect adopted as an illustration to s. 17 of the Indian Contract Act: "A. and B., traders, enter upon a contract. A. has private information of a change in prices which would affect B.'s willingness to proceed with the contract. A. is not bound to proceed with the contract."

That when there is no fiduciary relation, a vendor is not obliged to disclose any facts, not specially called for, which may affect the market value, but which do not conflict with any allegations implied in the conditions of sale, see *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Densmore Oil Co. v. Densmore*, 64 Penn. St. 43. That a purchaser, aware of the existence of a mine on land, is not bound to disclose the fact to the vendor, he being concerned in no misrepresentation, see *Fox v. Mackreth*, 2 Bro. C. C. 400; *Harris v. Tyson*, 24 Penn. St. 347; *Smith v. Beatty*, 2 Ired. Eq. 756; *Williams v. Spurr*, 24 Mich. 335; *Caples v. Steel*, 7 Oregon, 491; though see *Williams v. Beazley*, 3 J. J. Marsh. 577. In *Turner v. Harvey*, Jac. 169; Lord Thurlow said that a purchaser knowing of a mine on land, was not bound to disclose the fact to the vendor. That a lessee, taking a lease under a mistaken belief that there was coal in the land, is bound, see *Jefferys v. Fairs*,

L. R. 4 C. D. 448; and see, as to error in motive, *supra*, § 193.

In *Lungren v. Pennell*, Sup. Ct. Penn. 1881 (10 Weekly Notes, 297), it was held that vendors, unless occupying a fiduciary relation, are not bound to disclose to their vendees the prices at which they obtained the property sold. "The principles which control such a case," said Green, J., giving the opinion of the court, "are not difficult of statement or application. Our own case of *Densmore Oil Co. v. Densmore* (64 Penn. St. 14 P. F. S. 43) furnishes the test. We there held 'that any man or number of men, who are the owners of any kind of property, real or personal, may form a partnership or association with others, and sell that property to the association at any price which may be agreed upon between them, no matter what it may originally have cost, provided there be no fraudulent misrepresentation made by the vendors to their associates. They are not bound to disclose the profit which they may realize by the transaction. They were in no sense agents or trustees in the original purchase, and it follows that there is no confidential relation between the parties which affects them with any trust. It is like any other case of vendor and vendee. They deal at arm's length. Their partners are in no better position than strangers. They must exercise their own judgment as to the value of what they buy.'

"In the case of *McElhenny's Appeal* (61 Penn. St. 11 P. F. S. 188), *McElhenny*, who represented himself as the owner of the land, but in fact was not, agreed with *Boyd* and others that if they could sell it for \$40,000 they should share the profits with him over

added, that even when a misconception is expressed, a party hearing it is not necessarily bound to correct it. It may be as to a collateral matter, or as to a matter in respect to which the party's attitude does not require him to speak, as where a congregation listens in silence to a clergyman's statement,<sup>1</sup> or a party in court listens to the statements of a witness under examination.<sup>2</sup> A party's mental condition, also, and the degree of attention he was capable of paying, is to be taken into account when he is charged with assenting to statements made in his presence.<sup>3</sup> Nor is a party bound to make response to the intrusive comments of a stranger uttered while listening to a negotiation.<sup>4</sup> It is otherwise, where there is a suppression of a matter a party is bound in law to disclose.<sup>5</sup>

the cost price, which he said was \$12,000. This plan was carried out. Boyd and others formed a company to which the land was sold at \$40,000. The profits were divided with McElhenny, and the company filed a bill against his administrators to recover the money paid to him out of the treasury as part of the \$40,000 purchase-money. False representations as to the cost of the land were alleged and proved to have been made, and it was also shown that McElhenny never was the owner of the land, though it was ostensibly sold as his to the promoters, who in turn sold it to the company. This court, Thompson, C. J., in speaking of the transaction, said: 'It nowhere appears that McElhenny, the purchaser from Hubert, the original owner, did it as the agent of Messrs. Baird, Boyd & Co., and others, although he bought it to sell again, no doubt. He had a perfect right, therefore, to deal with them at arm's length, as it seems he did;' and again, 'If the property was not purchased by McElhenny for the use, and as agent of the company, but for his own use (and this is the proof in the case), he

might sell it at a profit most assuredly. No subsequent purchasers from his vendees would have any right to call upon him to account for the profit at which he sold to them.'

Where, however, the misunderstanding was promoted by a prior statement of the party, which statement, though true at the time, subsequently, by a change of circumstances, becomes false, this amounts to fraud. *Traill v. Baring*, 33 L. J. C. 54; *Reynell v. Sprye*, 1 D. M. & G. 660; and cases cited *supra*.

<sup>1</sup> *Johnson v. Trinity Church*, 11 Allen, 123.

<sup>2</sup> See Wh. on Ev. §§ 1138 *et seq.* for other exceptions.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Williams v. Beazley*, 3 J. J. Marsh. 577.

<sup>5</sup> *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511; *Harrower v. Hutchinson*, L. R. 5 Q. B. 584; *Pidcock v. Bishop*, 3 B. & C. 605; *Junkins v. Simpson*, 14 Me. 364; *Grove v. Hodges*, 55 Penn. St. 504; *Mitchell v. McDougall*, 62 Ill. 498; *McAdams v. Cates*, 24 Mo. 223. "It would be an error," said Lord Hatherley, in *Phillips v. Homfray*, L. R. 6 Ch. 779, "to say generally that you

§ 254. Whenever there is a fiduciary relation between parties engaged in a business transaction, then, as has been intimated, the party occupying towards the other a position of trust, is bound to disclose whatever facts would be necessary to enable his *cestui que trust* to act intelligently.<sup>1</sup> In such cases, a contract will be avoided by the concealment of material facts which between parties dealing on equal footing it would not be necessary to disclose.<sup>2</sup> And a fiduciary relation is implied when one party undertakes, as to the matter in question, to act as the other's agent, and to accept the position, as the other's representative, of being personally familiar with the subject of the negotiations.<sup>3</sup>—"The broad principle on which the court acts in cases of this description, is that, whenever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular."<sup>4</sup> But a

When there is a fiduciary relation, then disclosure becomes necessary.

cannot enforce a contract in the court when the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, yet the bargain is perfectly good." See notes to *Chandeler v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299 *et seq.*; and see *McMichael v. Kilmer*, 76 N. Y. 36. That an execution debtor is not bound at a sheriff's sale to disabuse purchasers of misapprehensions which he knows to be erroneous, see *Butcher v. Buchanan*, 17 Iowa, 81; *Schwickerath v. Cooksey*, 53 Mo. 75.

<sup>1</sup> *Supra*, §§ 217, 250 *et seq.*; *infra*, § 906.

<sup>2</sup> Leake, 2d ed. 339, 364; 1 Story, Eq. Jur. § 367; *Hunter v. Atkyns*, 3 Myl. & K. 113; *Arnot v. Briscoe*, 1 Ves. 95; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. D. 73; *Bag-*

*nall v. Carlton*, L. R. 6 C. D. 371; *Conant v. Jackson*, 16 Vt. 335; *Maynard v. Maynard*, 49 Vt. 297; *Gallatian v. Cunningham*, 8 Cow. 361; *Brown v. Montgomery*, 20 N. Y. 287; *Clodfelter v. Hulett*, 72 Ind. 137; *Shaeffer v. Sleade*, 7 Blackf. 178; *Emmons v. Moore*, 85 Ill. 304; *Yoste v. Langhran*, 49 Mo. 594; *McClure v. Lewis*, 72 Mo. 314; see *infra*, § 906.

<sup>3</sup> 1 Story, Eq. Jur. §§ 142, 209; *Pilling v. Armitage*, 12 Ves. 78; and see *Grim v. Byrd*, 32 Grat. 293.

<sup>4</sup> Wood, V. C., in *Tate v. Williamson*, L. R. 1 Eq. 536; 2 Ch. 55; see *Haygarth v. Wearing*, L. R. 12 Eq. 320; *S. P. Bagnall v. Carlton*, L. R. 6 C. D. 371; *Atwood v. Chapman*, 68 Me. 38; *Otis v. Raymond*, 3 Conn. 413; *Matthews v. Bliss*, 22 Pick. 48; *Leavitt v. Laforce*, 71 Mo. 353; see *infra*, § 906.

guarantee does not involve such fiduciary relationship as requires, in those inducing it, a fuller disclosure than in other ordinary contracts. It is "not a correct proposition, that the same rule prevails in case of guarantees as in insurances of ships, that all the material circumstances known to the insured are to be disclosed, though there should be no fraud in the concealment."<sup>1</sup>—Delicate questions arise when the party suppressing is not a technical trustee, but at the same time receives peculiar confidence from the party with whom he negotiates. In such cases there are two extremes to be avoided. On the one side, it is not to be maintained that any one who chooses to say to me, "I put peculiar confidence in you," should make it necessary for me, in any negotiation I may have with him, to disclose all that I know about the object of our negotiation. The subject may be very intricate, and may have numerous ramifications, as is the case, for instance, with that of the market value of most railroad securities; and for a well-informed specialist in this line to tell all that he may have learned on the subject after, it may be, a familiarity of years, would take an amount of time and trouble incompatible with the prompt discharge of business. And even were the narration undertaken, it could not be faithfully completed. There is no object so clearly defined as to be susceptible of absolutely accurate description; there are no words that can be used in which some ambiguity does not lurk.<sup>2</sup> It is absurd, therefore, to say that the mere fact of a party appealing to me to tell him everything, or the mere fact that he puts special trust in me, makes it necessary that I should tell him everything. And it is equally absurd to say, that a party is to be invested with the responsibilities of a trustee, unless he assumes those responsibilities. On the other hand, if I hold myself out as specially versed in a particular topic, and if I invite confidence in myself as so versed, and assume a confidential attitude to persons coming to me to deal with me, then, though I am not required to make a statement of all I

<sup>1</sup> Blackburn, J., *Lee v. Jones*, 17 C. 109; *Smith v. Bank*, 1 Dow. 272. See B. N. S. 506; adopted Leake, 2d ed. fully, *infra*, § 570 a.  
419; *Hamilton v. Watson*, 12 Cl. & F. <sup>2</sup> See Wh. on Ev. chapter I.



know when such a statement would impose on me a burden too heavy to be consistent with prompt discharge of business, yet I am bound to acquaint a party negotiating with me on this basis with any material facts which, I knowing them but he being ignorant of them, might deter him if he knew them from completing the bargain he is negotiating with me. This is not because I am his trustee, or occupy to him a fiduciary relation, as is the case with the parties bound under the principles enumerated in the first part of this section. But it is because, if I hold myself out as a specialist in a particular line of business, and accept an appeal to me for information and advice, I cannot withhold facts the knowledge of which would probably deter the party applying to me from making with me the bargain I propose.<sup>1</sup>

§ 255. It has been said by high authority that parties proposing to the public a business enterprise are bound to disclose all knowledge they may have as to the enterprise, "and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducement to take shares."<sup>2</sup>—But if this be the law, parties appealing to the public for support in complicated business enterprises would be obliged either to publish exhaustive treatises on the subject involved, or to conveniently limit their knowledge. If they could omit in their statements "no fact within their knowledge" which in any way bore on the question, they would have to take care not to know too much, and igno-

Proposer of business bound to give a fair statement.

<sup>1</sup> Fox v. Mackreth, 2 Bro. Ch. 400; *mons v. Moore*, 85 Ill. 304; *Yoste v. 1 Wh. & Tu. Lead. Cas. Eq. 4th Am. ed. 188; Haygarth v. Wearing*, L. R. 12 Eq. 320; *Laidlaw v. Organ*, 2 Wheat. 178; *Martin v. Jordan*, 60 Me. 531; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Bank of Republic v. Baxter*, 31 Vt. 101; *Harris v. Tyson*, 24 Penn. St. 347; *Watts v. Cummins*, 59 Penn. St. 84; *Lungren v. Pennell*, *supra*, § 252; *Shaeffer v. Sleade*, 7 Blackf. 178; *Em-*

*Laughran*, 49 Mo. 599; *Hastings v. O'Donnell*, 40 Cal. 148. See *Merriam v. Lapsley*, 12 Fed. Rep. 457, where a more extended liability is assumed. That a party is under such circumstances estopped by his silence, see *supra*, § 253.

<sup>2</sup> *Kindersley, V. C.*, in *New Brunswick R. R. v. Muggeridge*, 1 Dr. & Sm. 381, approved by Lord Chelmsford in

rance, rather than diligence and study, would be encouraged in those conducting such enterprises. The better rule was subsequently stated by Lord Cairns, that non-disclosure will not vitiate a contract of this class unless it work a perversion of facts.<sup>1</sup> But when there is such a perversion produced by non-disclosure, it exposes the parties concerned to liability.<sup>2</sup> And this rule has been applied to misleading statements as to the amount of shares subscribed to a company,<sup>3</sup> or as to the value of its property.<sup>4</sup>

§ 255 *a*. It is ruled in England that there is "a fiduciary relation between a promoter and the company in its corporate capacity, which imposes on the promoter the duty of full and fair disclosure in any transaction with the company, or even with persons provisionally representing the inchoate company before it is formed."<sup>5</sup> And by statute adopted in 1867, it is made the duty of the promoters of a company to disclose in the prospectus any previous contract entered into by the company or the promoters; in default of which, the prospectus is to be deemed fraudulent in respect to any one taking shares on faith of the prospectus.<sup>6</sup>

§ 256. Ordinarily, parties who enter on business negotiations do so at their own risk, so far as concerns information on the subject with which they deal, the reason being that the one has as great an opportunity of acquaintance with the facts as the other. We have seen, however, that a party who takes upon himself the duty of notifying to another a particular condition of things is as much liable for an omission which makes

Venezuela R. R. Co. v. Kisch, L. R. 2 H. L. 113. Phosphate Co., L. R. 3 Ap. Ca. 1218; Bagnell v. Carlton, L. R. 6 Ch. D. 371.

<sup>1</sup> Peek v. Gurney, L. R. 6 H. L. 403.

<sup>2</sup> Ibid.; Henderson v. Lacon, L. R. 5 Eq. 263; Oakes v. Turquand, L. R. 2 H. L. 325.

<sup>3</sup> Wright's case, L. R. 7 Ch. 55; Moore's case, L. R. 18 Eq. 661.

<sup>4</sup> Reese River Co. v. Smith, L. R. 4 H. L. 64; aff. S. C., L. R. 2 Ch. 604.

<sup>5</sup> Pollock, 3d ed. 522; citing New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. D. 73; aff. H. L. under name of Erlanger v. New Sombrero

<sup>6</sup> See comments in Pollock, 3d ed.

523; and as construing the statute see Gover's case, L. R. 20 Eq. 114; 1 Ch. D. 182; Twycross v. Grant, L. R. 2 C. P. D. 469; Sullivan v. Mitcalfe, L. R. 5 C. P. D. 455. That a promoter cannot, if concerned in fraudulent representations for his own profit, be paid for his services out of the funds of the company after it goes into bankruptcy, see Hereford Waggon Co. *in re*, L. R. 2 Ch. D. 621.

his communication in the main false, as he is for a misstatement that involves entire falsification; and that, in fact, an omission under such circumstances to state a qualifying fact is a negation of that qualifying fact.<sup>1</sup> We have also seen that this is the case with proposers of business enterprises and promoters of companies; and we will see in the next section that it is so with parties taking part in family negotiations. In this section we have to notice the most conspicuous illustration of the proposition before us—that which arises in insurance applications. An applicant for an insurance, in fact, is in the attitude of a person who is called upon to report not merely on a particular state of facts, but on a state of facts peculiarly within his own knowledge. Hence it has been held that “the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy.”<sup>2</sup> The suppression, therefore, of any material fact by a party seeking an insurance prevents the insurance from attaching.<sup>3</sup> An insurer is entitled to hear from the applicant all facts within the applicant’s distinctive knowledge which are material to the application; and the withholding of such facts vitiates the policy.<sup>4</sup> The facts, however, must be either known to the applicant, or of such a character that they ought to be known to him.<sup>5</sup> Whether the concealed fact is one which the applicant knew or ought to have known is for the jury.<sup>6</sup> The fact also must be material, and

<sup>1</sup> *Supra*, §§ 217, 250.

<sup>2</sup> Blackburn, J., *Ionides v. Pender*, L. R. 9 Q. B. 537; *Lewis v. Ins. Co.*, 10 Gray, 508, cited Anson, 140; *Lindenau v. Desborough*, 8 B. & C. 586; *Bufe v. Turner*, 6 Taunt. 338; *Clark v. Ins. Co.*, 8 How. 235; *New Y. Bowery Ins. Co. v. N. Y. Ins. Co.*, 17 Wend. 359; *Hartford Ins. Co. v. Harmer*, 2 Oh. St. 452; *Arnauld, Insurance*, 512.

<sup>3</sup> *New York Bowery Ins. Co. v. New York Ins. Co.*, 17 Wend. 359; see *supra*, §§ 217, 249. “The insurer has a right to know the whole truth.” *May on Ins.* 2d ed. § 200.

<sup>4</sup> *Kerr on Fraud and Mist.* 119; *Wheulton v. Hardisty*, 8 E. & B. 232; *Carter v. Boehm*, 3 Burr. 1905; *Clark v. Ins. Co.*, 8 How. 235; *Dennison v. Ins. Co.*, 20 Me. 125; *Fletcher v. Ins. Co.*, 18 Pick. 419; *Horn v. Ins. Co.*, 64 Barb. 81; *Evans v. Kneeland*, 9 Ala. 42; *Walden v. Ins. Co.*, 12 La. 134.

<sup>5</sup> *May on Ins.* 2d ed. § 200; *Sprott v. Ross*, 16 Ct. of Sess. 1145 (3 Big. Ins. Cas. 421); *Ross v. Bradshaw*, 1 W. Bl. 312 (4 Big. Ins. Ca. 574); *Hall v. Ins. Co.*, 6 Gray, 185; *Mutual Ins. Co. v. Robertson*, 59 Ill. 125.

<sup>6</sup> *May on Ins.* 2d ed. § 202; *Lindenau*

must be of a character which the applicant knew or ought to have known to have been material.<sup>1</sup> As material facts in fire insurance have been held to be the fact that attempts had been made to set fire to the building to be insured,<sup>2</sup> and in life insurance that the applicant had been insane twenty years before,<sup>3</sup> and that he had not sufficient means to support himself.<sup>4</sup> Pregnancy in a woman may be material.<sup>5</sup> But facts of which the insurer ought himself, in the due pursuit of his business, to be advised need not be disclosed.<sup>6</sup>—Where the applicant makes a special engagement to answer all questions put, the question put must be answered fully and fairly, and any failure in this respect avoids the policy.<sup>7</sup> But the entire omission to answer a question, the insurer waiving the right to insist, does not avoid.<sup>8</sup>

*v. Desborough*, 3 Man. & R. 45; *Geach v. Ingalls*, 14 M. & W. 95; *Vose v. Ins. Co.*, 6 Cush. 42; *Houghton v. Ins. Co.*, 8 Met. Mass. 114.

<sup>1</sup> *Jones v. Ins. Co.*, 3 C. B. N. S. 65; *Clark v. Ins. Co.*, 8 How. U. S. 235; *Dennison v. Ins. Co.*, 20 Me. 125; *Campbell v. Ins. Co.*, 98 Mass. 381; *Mallory v. Ins. Co.*, 47 N. Y. 52; *Mutual Ins. Co. v. Wise*, 34 Md. 582; 2 Big. Ins. Cas. 43; *Satterthwaite v. Ins. Co.*, 14 Penn. St. 393; *Keith v. Ins. Co.*, 52 Ill. 518; *Price v. Ins. Co.*, 17 Minn. 497; *Hill v. Ins. Co.*, 2 Mich. 476; see *Burritt v. Ins. Co.*, 5 Hill, 188; *Gates v. Ins. Co.*, 1 Selden, 469.

<sup>2</sup> *Curry v. Ins. Co.*, 10 Pick. 535; *Beebe v. Ins. Co.*, 25 Conn. 51; *New York Bowery Ins. Co. v. N. Y. Ins. Co.*, 17 Wend. 359; *Walden v. Ins. Co.*, 12 La. 134.

<sup>3</sup> *Mallory v. Ins. Co.*, 47 N. Y. 52.

<sup>4</sup> *Valton v. Ass. Soc.*, 1 Keyes, 21; but see *City Ins. Co. v. Carrugi*, 41 Ga. 660; *Delahay v. Ins. Co.*, 8 Humph. 684.

<sup>5</sup> *Lefavom v. Ins. Co.*, 1 Phila. 558.

<sup>6</sup> *Supra*, §§ 217, 250; *Carter v. Boehme*, 1 W. Bl. 593; *Pimm v. Lewis*, 2 F. & F. 778; *Foley v. Tabor*, 2 F. & F. 663; *Haley v. Ins.*

*Co.*, 12 Gray, 545; *Boggs v. Ins. Co.*, 30 Mo. 63.

<sup>7</sup> May on Ins. 2d ed. § 206, citing *McDonald v. Ins. Co.*, L. R. 9 Q. B. 328; *Jeffries v. Ins. Co.*, 22 Wall. 47; *Hardy v. Ins. Co.*, 4 Allen, 217; *Shawmut Ins. Co. v. Stevens*, 9 Allen, 332; *Chaffee v. Ins. Co.*, 18 N. Y. 376; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *North Am. Ins. Co. v. Throop*, 22 Mich. 146. As to equivocal questions, see May on Ins. 2d ed. §§ 210 *et seq.* That an agent's concealment is imputable to principal, see May, *ut supra*, § 213. That evasive answers concealing the truth are misstatements, see Bliss on Ins. 165; *Cazenove v. Ins. Co.*, 6 C. B. N. S. 437; *Perrins v. Ins. Co.*, 2 E. & E. 317; *Smith v. Ins. Co.*, 49 N. Y. 211; *Hartman v. Ins. Co.*, 21 Penn. St. 466. A concealment by an applicant for life insurance of the fact that his proposal for insurance in other offices had been declined, he having been questioned on this point, is material, and avoids the contract. *London Ass. v. Mansell*, L. R. 11 Ch. D. 363; 41 L. T. N. S. 225.

<sup>8</sup> See *Armenia Ins. Co. v. Paul*, 91 Penn. St. 520.

§ 256*a*. Similar observations may be made as to the parties to family negotiations.<sup>1</sup> Members of a family, in negotiating with each other in respect to a family settlement, are supposed to disclose all material facts to each other; and if one perceives another to be laboring under an essential misapprehension, the party knowing the truth is bound to correct such misapprehension. Under such circumstances the non-correction of the misapprehension is equivalent to its indorsement. "Full and complete communication of all material circumstances is what the court must insist on." "Without full disclosure, honest intention is not sufficient,"<sup>2</sup> and although, as Mr. Pollock well remarks in commenting on this point, this does not make the communication of mere gossip essential, yet it does make essential the communication of whatever a good business man would deem of importance under the circumstances.<sup>3</sup> It is otherwise, however, when the parties are not on good terms, and are dealing at arm's length.<sup>4</sup>—The rule before us applies to all negotiations in view of marriage.<sup>5</sup> Hence all marriage settlements in fraud of marital rights may be avoided.<sup>6</sup> But this applies only to settlements in which full disclosure is required. Hence it will require strong proof of active perversion of truth to set aside a release of dower for fraudulent suppression of fact by the party obtaining the release.<sup>7</sup>

So with parties to family negotiations.

§ 257. When the parties to a contract have the same thing in view, the contract is not avoided by the fact that one of them makes a promise to do some particular thing (such thing not being a condition precedent

False promise not a false statement.

<sup>1</sup> See *supra*, § 217.

<sup>2</sup> *Gordon v. Gordon*, 3 Sw. 400.

<sup>3</sup> Poll. 3d ed. 520; see *Fane v. Fane*, L. R. 20 Eq. 698; *Leonard v. Leonard*, 2 B. & B. 180; *Greenwood v. Greenwood*, 2 De G. J. & S. 28.

<sup>4</sup> *Irvine v. Kirkpatrick*, 7 Bell's Ap. Cas. 186; and see *Brent v. Brent*, 10 L. J. Ch. 84.

<sup>5</sup> *Kline v. Kline*, 57 Penn. St. 120; *Kline's Es.*, 64 Penn. St. 122. "There must be, in ante-nuptial settlements, a full disclosure of the circumstances

and property of each. If the provision secured for the wife is manifestly unreasonable and disproportionate to the means of the intended husband, it raises a presumption of intended concealment, and throws on him the burden of disproving that presumption." *Mercur, J., Bierer's Est.*, 92 Penn. St. 266.

<sup>6</sup> *Infra*, §§ 266, 399.

<sup>7</sup> *Stine v. Sherk*, 1 W. & S. 195; *Cummins v. Hurlbutt*, 92 Penn. St. 165; *Bierer's Est.*, 92 Penn. St. 267.

to the act), which thing he does not afterwards do. The false statement must go to the quality of the thing contracted for as it actually is, otherwise it does not prevent that concurrence of minds on one thing which is the distinguishing feature of a contract, nor does it expose the party making it to an action for deceit, however much he might be liable on the breach of promise.<sup>1</sup> No representation of a probable future state of things can be a false pretence as to an existing fact affecting a particular transaction.<sup>2</sup> But a false statement made or implied of a party's intentions at the time may be a fraud that may avoid the contract he may make on the basis of such a statement, or may expose him to an action of deceit. There is no concurrence of minds, and hence there can be no contract. And if a statement of intention to do a particular thing is part of the consideration of a contract, and the party making the statement afterwards changes his intention, he is bound to communicate this fact at the earliest period to the party to whom the representation was made, and is liable for any loss the other party may incur through his change of attitude. A contract made on the basis of such misrepresentation ought not to be enforced when the misrepresentation is material.<sup>3</sup>—A party, it should be added, who agrees as consideration of a contract to do certain things in the future for the other contracting party, cannot compel, in equity, specific performance of the contract when the thing he promised to do is unperformed.<sup>4</sup>

<sup>1</sup> *Burrell ex parte*, L. R. 1 Ch. D. 552; *Feret v. Hill*, 15 C. B. 207; *Grove v. Hodges*, 55 Penn. St. 519; see fully *supra*, §§ 177 *et seq.* 187.

<sup>2</sup> *Jorden v. Money*, 5 H. L. Cas. 185; *Vernon v. Keys*, 4 Taunt. 488; *Burrell ex parte*, L. R. 1 Ch. D. 552; *R. v. Lee*, L. & C. 309; *R. v. Woodman*, 14 Cox C. C. 179; *Sawyer v. Prickett*, 19 Wall. 146; *Long v. Woodman*, 58 Me. 49; *Pedrick v. Porter*, 5 Allen, 324; *Pike v. Fay*, 101 Mass. 134; *Mooney v. Miller*, 102 Mass. 217; *Coil v. College*, 40 Penn. St. 445; *Dillingham v. State*, 5 Oh. St. 280; *Colly v. State*, 55 Ala.

85; *State v. Evers*, 49 Mo. 542; *Ryan v. State*, 45 Ga. 128; *State v. Prather*, 44 Ind. 287; *Keller v. State*, 51 Ind. 111; *Gage v. Lewis*, 68 Ill. 604; *Hazlett v. Burge*, 22 Iowa, 535; see *Fisher v. N. Y. Com. Pl.*, 18 Wend. 608; *Southwick v. Band*, 84 N. Y. 421; *Morrison v. Kock*, 32 Wis. 254.

<sup>3</sup> *Traill v. Baring*, 4 D. J. S. 318; *Slim v. Croncher*, 1 D. F. J. 518; see *supra*, §§ 149 *et seq.*

<sup>4</sup> *Peacock v. Pension*, 11 Beav. 355; *Lamare v. Dixon*, L. R. 6 H. L. 414; see notes to *Chandelor v. Lopus*, 1 Smith L. C. 7th Am. ed. 299 *et seq.*

§ 258. If there be an intention at the time of a purchase not to pay for the thing purchased (which is to be gathered from all the facts of the case), this is a fraud which entitles the vendor to avoid the contract and exposes the party defrauding to an action for deceit.<sup>1</sup> But the intention must be *never* to pay. If it be not to pay at a time designated, but to pay ultimately, the misrepresentation, unless time be of the essence of the contract, does not avoid it.<sup>2</sup> Even a knowledge by a purchaser that at the

Intention  
not to pay  
may be a  
false pre-  
tence.

<sup>1</sup> *Benj. on Sales*, 3d Am. ed. § 440; *Wilson v. Finch-Hatton*, L. R. 2 Eq. D. 336; *Ferguson v. Carrington*, 9 B. & C. 59; *Noble v. Adams*, 7 Taunt. 59; *Load v. Green*, 15 M. & W. 216; *Hammersley v. DeBiel*, 12 Cl. & F. 45; *Clough v. R. R.*, L. R. 7 Exch. 26; *Conyers v. Ennis*, 2 Mason, 236; *Parker v. Byrnes*, 1 Lowell, 539; *Donaldson v. Farwell*, 93 U. S. 631; *Stewart v. Emerson*, 52 N. H. 301; *Hovey v. Grant*, 52 N. H. 569; *Dow v. Sanborn*, 3 Allen, 181; *Kimball v. Ætna Co.*, 9 Allen, 540; *Wiggin v. Day*, 9 Gray, 97; *Jordan v. Osgood*, 109 Mass. 457; *Ash v. Putnam*, 1 Hill, 302; *Hall v. Naylor*, 6 Duer, 71; *Byrd v. Halls*, 2 Keyes, 647; *Hennequin v. Naylor*, 24 N. Y. 139; *Wright v. Brown*, 67 N. Y. 1; *Rogers v. Salmon*, 8 Paige, 559; *Mackinley v. Macgregor*, 3 Whart. 369; *Rodman v. Thalheimer*, 75 Penn. St. 232; *Powell v. Bradlee*, 9 Gill & J. 220; *Peters v. Hilles*, 48 Md. 506; *Shipman v. Seymour*, 40 Mich. 274; see, however, *contra*, *Smith v. Smith*, 21 Penn. St. 367; *Backentoss v. Speicher*, 31 Penn. St. 324; *Bidault v. Wales*, 19 Mo. 36; *Bidault v. Wales*, 20 Mo. 546; *Bell v. Ellis*, 33 Cal. 620. That a concealment of an intention not to pay is a fraud, see *Stewart v. Emerson*, 52 N. H. 301.

<sup>2</sup> *Mitchell v. Worden*, 20 Barb. 253; *Bidault v. Wales*, 20 Mo. 546. It is said in Pennsylvania that mere inten-

tion not to pay, without some artifice to get possession, does not avoid a sale when there has been a delivery of the property. *Smith v. Smith*, 21 Penn. St. 367; *Backentoss v. Speicher*, 31 Penn. St. 324; *Pottinger v. Hecksher*, 2 Grant, 309; but see *Hoffman v. Strohecket*, 7 Watts, 86. And a mere promise without a definitive intention as to paying is not a fraud which avoids. *Buffington v. Garrish*, 15 Mass. 158; *Griffin v. Chubb*, 7 Tex. 613. In *Whitaker ex parte*, L. R. 10 Ch. 446, a trader bought goods at auction on credit, obtaining possession of them, without disclosing the fact that he was then under proceedings in the bankrupt court, having committed an act of bankruptcy. It was held that this by itself did not avoid the purchase, and that the goods vested in the bankrupt assignee. It was, however, further said that the buyer "must be taken to have made an implied representation that he intended to pay for the goods, and if it were clearly made out that at the time he did not intend to pay for them, a case of fraudulent misrepresentation would be shown." *Leake*, 2d ed. 354; see *supra*, 249. As sustaining the text, see further *Stewart v. Emerson*, 52 N. H. 301; *Kline v. Baker*, 99 Mass. 253; *Stubbs v. Johnson*, 127 Mass. 219; *Thompson v. Rose*, 16 Conn. 71; *Barnard v. Campbell*, 65 Barb. 286; *Del-*

time he was insolvent, without any reasonable expectation of paying, does not, by itself, avoid the contract or expose the purchaser to an action for deceit.<sup>1</sup> It is for the jury to determine "whether the representations (of an insolvent purchaser) were intended and understood as statements of facts, or mere expressions of opinion or judgment."<sup>2</sup>

§ 259. The fraud must go to a specific fact, as distinguished from a general opinion.<sup>3</sup> It is not a fraudulent misstatement, therefore, which avoids a contract, to say untruly that a particular article is a very good one of its class; though it is a misstatement to say that the article belongs to a class when it does not. To say untruly, for instance, of a particular horse, that he is a good horse and serviceable in the vendor's opinion, does not avoid a sale of the horse; but it would be otherwise if the horse was declared to be a particular horse, well known in the market, which he is not.<sup>4</sup> To say of a flock, "this is a first-rate flock," cannot, no matter how false, be regarded as a fraudulent false statement, though it would be otherwise if certain

False opinion of a thing not a fraud that avoids.

lone v. Hull, 47 Md. 112; Talcott v. Henderson, 31 Oh. St. 162. That suppression of the party's insolvency is not a deceit, see *supra*, § 249.

<sup>1</sup> *Supra*, § 249; *infra*, § 262; Benj. on Sales, 3d Am. ed. § 441; Irving v. Motley, 7 Bing. 543; Whitaker *ex parte*, L. R. 10 Ch. 446; Biggs v. Barry, 2 Curt. 259; Hale v. Ins. Co., 12 Fed. Rep. 359; Hodgeden v. Hubbard, 18 Vt. 504; Reddington v. Roberts, 25 Vt. 686; Rowley v. Bigelow, 12 Pick. 307; Morrill v. Blackman, 42 Conn. 324; Andrew v. Dieterick, 14 Wend. 31; Hennequin v. Naylor, 24 N. Y. 139; Rodman v. Thalheimer, 75 Penn. St. 232; Powell v. Bradlee, 9 Gill & J. 220; Talcott v. Henderson, 31 Oh. St. 162; Patton v. Campbell, 70 Ill. 72; Shipman v. Seymour, 40 Mich. 274; Garbutt v. Bank, 22 Wis. 384.

<sup>2</sup> Morton, J., Morse v. Shaw, 124 Mass. 59; see notes to Chandelor v. Lopus, 1 Smith's L. C. 7th Am. ed. 299.

<sup>3</sup> *Supra*, § 215; Citizens' Bank v. Bank of New Orleans, L. R. 6 H. L. 352; Power v. Barham, 4 Ad. & E. 476; Jendwine v. Slade, 2 Esp. 573; Evans v. Collins, 5 Q. B. 805; Sawyer v. Prickett, 19 Wal. 146; Stebbins v. Eddy, 4 Mason, 414; Foster v. Caldwell, 15 Vt. 176; Hazard v. Irwin, 18 Pick. 105; Watts v. Cummins, 59 Penn. St. 84; Clark v. Everhart, 63 Penn. St. 347; Savage v. Jackson, 19 Ga. 305; Stow v. Boseman, 29 Ala. 397; Longshore v. Jack, 30 Iowa, 298; Barlow v. Wiley, 3 A. K. Marsh. 457; Townsend v. Cowles, 31 Ala. 428; Herring v. Skaggs, 62 Ala. 180; Broughton v. Winn, 60 Ga. 486; Reel v. Ewing, 4 Mo. Ap. 569. This topic is discussed in its criminal relations in Wh. Cr. L. 8th ed. §§ 1154 *et seq.*, and see *supra*, § 215.

<sup>4</sup> State v. Mills, 17 Me. 211; see Harvey v. Young, 1 Yelv. 21; Sieveking v. Litzler, 31 Ind. 17.



sheep in the flock were falsely declared to be free from disease.<sup>1</sup> So to say untruly that a rope, offered for sale, is good, and will bear a heavy weight, is not a false representation, but it is otherwise with a statement that the rope has sustained a particular test, or is of a particular quality.<sup>2</sup> And an untrue statement of a fact as merely "probable," is not a false representation, when probability is not the question at issue.<sup>3</sup>—To say of a document, also, that it has a particular legal meaning, is a matter of opinion, open to both sides to express (neither pretending to be an expert), the expression of which opinion does not ordinarily impose liability on a person not a specialist;<sup>4</sup> though it would be otherwise as to an assertion that a particular line of facts falls within a particular rule.<sup>5</sup> But when any particular fact is so material that an agreement concerning it is necessary to a consent by the parties to one and the same thing, then any deliberate false statement as to such fact, though in the shape of an opinion, avoids the contract, and renders the party making such false statement liable in an action for deceit.<sup>6</sup> This is the case with regard to a false statement concerning quantity, when this is material;<sup>7</sup> though, as will hereafter be seen, a party who receives a less

<sup>1</sup> *People v. Crissie*, 4 Denio, 525; see *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Moens v. Heyworth*, 10 M. & W. 147; *supra*, § 215 *et seq.*

<sup>2</sup> *Bispham's Eq.* § 207, citing *Sieveling v. Litzler*, 31 Ind. 17; *Coon v. Atwell*, 46 N. H. 510; *Reid v. Flippen*, 47 Ga. 273; *Allin v. Millison*, 72 Ill. 201; *supra*, § 215 *et seq.*

<sup>3</sup> *Halls v. Thompson*, 1 Sm. & M. 443. That expressions of opinion are not to be regarded as misrepresentations, see *supra*, § 215; *Ferson v. Sanger*, 1 Wood. & M. 146; *Buschmann v. Codd*, 52 Md. 202.—"Ordinarily," says Judge Story, "matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party, when each has equal

means of information." *Story's Eq. Jur.* 12th ed. § 197.

<sup>4</sup> *Upton v. Englehardt*, 3 Dill. 343; *Clem v. R. R.*, 9 Ind. 488; *Smith v. Calvert*, 44 Ind. 242; *Mullen v. Park*, 64 Ind. 202; *Clodfelter v. Hulett*, 72 Ind. 137, and cases cited *supra*, § 198.

<sup>5</sup> *Supra*, §§ 199, 201; *Edwards v. Brown*, 1 C. & J. 312; *Hirschfield v. R. R.*, L. R. 2 Q. B. D. 1.

<sup>6</sup> *Herring v. Skaggs*, 62 Ala. 180.

<sup>7</sup> *Supra*, § 190; *infra*, §§ 601, 898; *Irving v. Thomas*, 18 Me. 418; *Whitney v. Allaire*, 1 Comst. 305; *Clark v. Baird*, 9 N. Y. 183; *Wiswall v. Hall*, 3 Paige, 313; *Hill v. Brower*, 76 N. C. 124; *Kelly v. Allen*, 34 Ala. 663; *Cox v. Reynolds*, 7 Ind. 257; *Foley v. Cowgill*, 5 Blackf. 18; *Shaeffer v. Sleade*, 7 Blackf. 178.

sum than was bargained for can claim an abatement *pro tanto* if sued for the price.<sup>1</sup> A vendor is also thus liable for false statements as to the capacity of a mill,<sup>2</sup> as to the foundation of a building,<sup>3</sup> as to the amount of crops raised on a farm,<sup>4</sup> and as to the age and essential characteristics of a horse.<sup>5</sup>—What would be matter of opinion when spoken by a non-specialist, may be a matter of fact when spoken by a specialist.<sup>6</sup> A vague statement of the value of a picture, for instance, by a mere dealer, would not bind; but it would be otherwise with regard to a statement by one professing to be a connoisseur, giving an official valuation.<sup>7</sup>—Hence, statements made by the president of a railroad corporation, to induce a party to buy stock in the corporation, that the corporation was able to lay its track and provide rolling stock, and pay all bills contracted, and that its stock was not for sale, and could not be bought anywhere but of him, are to be regarded as representations of fact, and not as expressions of opinion.<sup>8</sup>—As matters of opinion, under the present head, are to be classed statements as to the utility of particular inventions for which patent rights are offered for sale.<sup>9</sup> It is otherwise as to statements by vendors as to the practical characteristics of patent rights.<sup>10</sup>—Unless there be a fiduciary relation between vendor and purchaser, or unless the party speaking speaks, as we have seen, as a specialist, opinions of value,<sup>11</sup> no matter how exaggerated, do not impose liability, so long as these opinions consist of estimates, and do not involve warranties or representations of specific facts.<sup>12</sup> Liability, however, attaches, when

<sup>1</sup> *Infra*, §§ 899 *et seq.*

<sup>2</sup> *Sieveking v. Litzler*, 31 Ind. 17; *Faribault v. Sater*, 13 Minn. 223.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Martin v. Jordan*, 60 Me. 531; *Coon v. Atwell*, 46 N. H. 510; *Mooney v. Miller*, 102 Mass. 217.

<sup>5</sup> *R. v. Keighley, D. & B.* 145; *Reid v. Flippen*, 47 Ga. 273.

<sup>6</sup> *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Hubbell v. Meigs*, 50 N. Y. 480; *Shaeffer v. Sleade*, 7 Blackf. 178.

<sup>7</sup> *Story's Eq. Jur.* § 198, citing *Hill v. Gray*, 1 Stark. 352; *Martin v. Jor-*

*dan*, 60 Me. 531; *Wakeman v. Dalley*, 51 N. Y. 27. See § 260 for other cases.

<sup>8</sup> *Teague v. Irwin*, 127 Mass. 217; see *Grim v. Byrd*, 32 Grat. 293, and see cases cited to § 260.

<sup>9</sup> *Hunter v. McLaughlin*, 43 Ind. 38.

<sup>10</sup> *Bigler v. Flickinger*, 56 Penn. St. 279; *Rose v. Hurley*, 39 Ind. 77.

<sup>11</sup> *Supra*, § 254.

<sup>12</sup> See note to *Chandelor v. Lopus*, 1 Smith's Lead. Cas. 7th Am. ed. 299 *et seq.*; *Lomi v. Tucker*, 4 C. & P. 15; *Hill v. Gray*, 1 Stark. 352; *Willard v. Randall*, 65 Me. 81; *Manning v. Albee*,

the statement of opinion is by a person occupying a fiduciary position, or by one appealed to as an umpire, or by one undertaking to make inquiries for the party deceived, or as a specialist.<sup>1</sup>

§ 260. We have noticed in the last section, the limitations under which opinions as to value may bind the party giving them. It may be said, in addition, And so of conjectural value. that a value given conjecturally, or as an estimate, or an expression of opinion, by a party negotiating a sale, is not ordinarily to be regarded as a representation of a fact whose falsity exposes the party making it to rescission of the contract made by him, or to an action for deceit,<sup>2</sup> unless such value be

11 Allen, 622; *Cooper v. Lovering*, 106 Mass. 79; *Homer v. Perkins*, 124 Mass. 431; *Wolcott v. Mount*, 38 N. J. L. 496; *Merwin v. Arbuckle*, 81 Ill. 501; *McClanahan v. McKinley*, 52 Iowa, 222.

<sup>1</sup> *Fisher v. Budlong*, 10 R. I. 525; *Harris v. McMurray*, 23 Ind. 9; *Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515; see *Power v. Barham*, 4 Ad. & E. 473; *Payne v. Smith*, 20 Ga. 654; and cases cited above, see *supra*, § 254 as to fiduciary relations.

In *Power v. Barham*, 4 Ad. & El. 476, 6 N. & M. 62, 7 C. & P. 356, it was held that where a bill of sale described certain pictures as "Four pictures, views in Venice, Canaletti," it was for the jury to determine whether this was a conjectural opinion or absolute statement that the pictures were by Canaletti (see *supra*, § 220). In *Jendwine v. Slade*, 2 Esp. 573 (*Story on Cont.* § 639), Lord Kenyon said: "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not." In *Power v.*

*Barham*, *supra*, Lord Denman said: "It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to (*Jendwine v. Slade*). But the case here is, that pictures are sold with a bill of parcels, containing the words, 'Four pictures, views in Venice, Canaletti.' Now, words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all these circumstances, what was the effect of the words, and whether they implied a warranty of genuineness or conveyed only a description or expression of opinion."

<sup>2</sup> *Story*, Eq. Jur. § 201; *Sug. V. & P.* 543; *Bramley v. Alt*, 3 Ves. 624; *Smith v. Clark*, 12 Ves. 483; *Bexwell v. Christie*, 1 Cowp. 395; *Holbrook v. Connor*, 60 Me. 578; *Morrill v. Wallace*, 9 N. H. 111; *Medbury v. Watson*, 6 Met. 246; *Davis v. Meeker*, 5 Johns. 354; *People v. Crissie*, 4 Denio, 525; *Sandford v. Handy*, 23 Wend. 260; *Sankey v. Bank*, 78 Penn. St. 48; *Bristol v. Braidwood*, 28 Mich. 191; *Noetling v. Wright*, 72 Ill. 390; *Tuck v. Downing*, 76 Ill. 71; *Walker v. R*

given by an expert as such;<sup>1</sup> nor, such is the prevalent opinion, is a statement of the price an article brought at a prior sale,<sup>2</sup> unless such price be an important factor in determining the question whether a purchase be made.<sup>3</sup> And a misrepresentation of the price at which property offered for sale has been let, imposes liability.<sup>4</sup> And when an opinion as to value has a material influence in the adoption of the contract, and when the party accepting a proposal accepts it on this basis, then an intentionally false statement of value avoids the contract and exposes the party making it to an action for deceit.<sup>5</sup>

Misrepresentation  
to be distinguished  
from  
"puffs."

§ 261. A misrepresentation is to be distinguished from a puff. Few articles are sold in the market without preliminary puffs, express or implied; but these puffs are regarded on all sides as mere

R., 34 Miss. 245; *Anderson v. Hill*, 12 Sm. & M. 679; *Foggart v. Blackweller*, 4 Ired. 238; *Ricks v. Dillahunty*, 8 Port. 134; *Graffenstein v. Eppstein*, 23 Kan. 443. That an affirmation of value is not a warranty, see *supra*, §§ 219 *et seq.*; and see to same effect, *Wetherill v. Neilson*, 20 Penn. St. 448; *Weimer v. Clement*, 37 Penn. St. 147; *Whitaker v. Eastwick*, 75 Penn. St. 229.

<sup>1</sup> 1 Story, Eq. Jur. § 198; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Hill v. Gray*, 1 Stark. 352; *Pike v. Fay*, 101 Mass. 134; *Pickard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515; *Birdsey v. Butterfield*, 34 Wis. 52; and illustrations given in § 260.

<sup>2</sup> *Long v. Woodman*, 58 Me. 52; *Bishop v. Small*, 63 Me. 12; *Holbrook v. Conner*, 60 Me. 578; *Medbury v. Watson*, 6 Met. 246; *Hammer v. Cooper*, 8 Allen, 334; *Manning v. Albee*, 11 Allen, 520; *Cooper v. Lovering*, 106 Mass. 79; *Noetling v. Wright*, 72 Ill. 390.

<sup>3</sup> See *Bigelow on Fraud*, 19, citing *Elkins v. Tresham*, 1 Lev. 102; *Dobell*

*v. Stevens*, 3 B. & C. 623; *Bowring v. Stevens*, 2 C. & P. 337; *Lawton v. Kittredge*, 30 N. H. 500; *Hammatt v. Emerson*, 27 Me. 308; *Bacon v. Frisbie*, 15 Hun, 26; *Van Epps v. Harrison*, 5 Hill, 63; *McAleer v. Horsey*, 35 Md. 439; *Morhead v. Eades*, 3 Bush, 121; *Kost v. Bender*, 25 Mich. 525; *Nowlin v. Snow*, 40 Mich. 699; though see *Tuck v. Downing*, 76 Ill. 71. As sustaining text, see *Lindsay Co. v. Hurd*, L. R. 5 P. C. 221; *Morison v. Thompson*, L. R. 9 Q. B. 450; *Medbury v. Watson*, 6 Met. 259.

<sup>4</sup> *Dimmock v. Hallett*, L. R. 2 Ch. 21; *McClellan v. Scott*, 24 Wis. 81.

<sup>5</sup> *Haygarth v. Wearing*, L. R. 12 Eq. 327; *Simar v. Canady*, 53 N. Y. 298; *Stover v. Wood*, 11 C. E. Green, 417; *Neil v. Cummings*, 75 Ill. 170; *Davis v. Jackson*, 22 Ind. 233; *Bryan v. Hitchcock*, 43 Mo. 527; *Gifford v. Carvill*, 29 Cal. 589; *Cruess v. Fessler*, 39 Cal. 336, cited *Bigelow on Fraud*, 18; and see further to same effect, *Sandford v. Handy*, 23 Wend. 269; *Kenner v. Harding*, 85 Ill. 264.

vague recommendations, not to be contractually binding.<sup>1</sup> Commendatory expressions, therefore, such as are usual in public sales, do not vitiate the contract when they refer to matters open to inquiry on all sides, and are part of the usual phraseology in which offers to sell are couched.<sup>2</sup> And mere commendation or praise, no matter how extravagant, is not to be regarded as imposing liability.<sup>3</sup>

§ 262. A false representation of another's solvency, when it is so made as to secure credit, exposes the party making it to an action for deceit, and opens any contract based on it to rescission on application of the injured party.<sup>4</sup> The same may be said of averments that a party is possessed of certain specified assets.<sup>5</sup> But in such cases, the averment must go to some particular fact. Liability is not imposed by the mere statement of a party that he would be willing to trust the person whose solvency is at issue.<sup>6</sup> But although it has been held in Vermont, that a party's false statement of his own solvency does not sustain an action against him for deceit,<sup>7</sup> the prevalent opinion is, that such a statement is not only actionable, but is ground for rescinding a contract which it induces.<sup>8</sup>

False representations of solvency bind.

<sup>1</sup> *R. v. Ridgway*, 3 F. & F. 838; *State v. Estes*, 46 Me. 150; *People v. Crissie*, 4 Denio, 525; *French v. Griffin*, 3 C. E. Green, 279; *Hunter v. McLaughlin*, 43 Ind. 38.

<sup>2</sup> *Dimmock v. Hallett*, L. R. 2 Ch. 27 (where it was held that "fertile and improvable" was a mere opinion); *Trower v. Newcombe*, 3 Mer. 704; *Tuck v. Downing*, 76 Ill. 71; *Barlow v. Wiley*, 3 A. K. Mar. 459; *Schramm v. O'Conner*, 98 Ill. 539. As to value, see *supra*, § 260; as to descriptive terms, see *infra*, §§ 559, 903.

<sup>3</sup> *Bispham's Eq.* § 215; *Irving v. Thomas*, 18 Me. 418; *Savage v. Jackson*, 19 Ga. 305; *Halls v. Thompson*, 1 Sm. & M. 443.

<sup>4</sup> *Pasley v. Freeman*, 3 T. R. 51; *R. v. Henderson*, Car. & Marsh. 328; *People v. Kendall*, 25 Wend. 399.

<sup>5</sup> *R. v. Cooper*, L. R. 2 Q. B. D. 510; *Com. v. Burdick*, 2 Barr, 163; see *Weeks v. Burton*, 7 Vt. 67; *Edwards v. Owen*, 15 Ohio, 500; *Foxworth v. Bullock*, 44 Miss. 457.

<sup>6</sup> *Gainsford v. Blatchford*, 7 Price, 549; *Glover v. Townsend*, 30 Ga. 90.

<sup>7</sup> *Dyer v. Tilton*, 23 Vt. 313; see *State v. Sumner*, 10 Vt. 587.

<sup>8</sup> *Wh. Cr. L.* 8th ed. §§ 1135 *et seq.*; *Bigelow on Fraud*, 25; *R. v. Henderson*, Car. & Marsh. 328; *R. v. Bull*, 13 Cox, Cr. C. 608; *Stewart v. Emerson*, 52 N. H. 301; *Com. v. Drew*, 19 Pick. 179; *Kidney v. Stoddard*, 7 Met. 252; *Dow v. Sanborn*, 3 Allen, 181. *Thompson v. Rose*, 16 Conn. 71; *People v. Kendall*, 25 Wend. 399; *Ash v. Putnam*, 1 Hill, 302; *State v. Simmons*, 58 Ind. 98.

Insolvency, with an intention not to pay, constitutes, as we have already seen, a false pretence which will avoid a sale.<sup>1</sup> But mere insolvency is not a fact which a party, even if he is conscious of it, is bound to state, unless it is accompanied with an intention not to pay.<sup>2</sup>

§ 263. The distinctions above stated apply, *a fortiori*, to false warranties. A warranty is distinguished from a statement in this, that a false statement can only be sued on in an action for deceit, while a false warranty can also be sued on as a contract, it not being necessary to prove, if this form of action be chosen, an intention to deceive. But a warranty, when made with intention to deceive, will sustain an action for deceit, or an application to rescind a contract induced by it. In such case, however, there must be a specific assertion of quality attached to a particular thing. A mere conjectural estimate is not a warranty.<sup>3</sup> On a mere warranty without fraud, therefore, the remedy is not rescission, but a suit on the warranty. If there be fraud, there is a right to rescind, notwithstanding the warranty.

§ 264. A general misstatement of law by a vendor, not amounting to a warranty of title, does not avoid a sale, or expose the party making it to an action for deceit, even though there be grounds to infer that he knew at the time the statement was untrue.<sup>5</sup> A party, for instance, may have strong grounds to believe that certain bonds would be held, if the question were adjudicated, to be illegal; yet a state-

<sup>1</sup> *Supra*, § 258.

<sup>2</sup> *Supra*, § 258; *Hennequin v. Naylor*, 24 N. Y. 139; *Patton v. Campbell*, 70 Ill. 72; and cases cited *supra*, § 258.

<sup>3</sup> *R. v. Ridgway*, 3 F. & F. 838; *R. v. Sherwood*, D. & B. 251; *Winsor v. Lombard*, 18 Pick. 60; *Chadsey v. Greene*, 24 Conn. 562; *McGrew v. Forsythe*, 31 Iowa, 179; see fully *supra*, §§ 219 *et seq.*; *infra*, §§ 904. *et seq.*

<sup>4</sup> *Infra*, §§ 282, 904; Leake, 2d ed. 406; *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 207; *Murray v. Mann*, 2 Ex. 538. See notes to *Chandelor v. Lopus*, 1 Smith's L. C. 7th Am. ed. 299.

<sup>5</sup> *Upton v. Tribilcock*, 91 U. S. 45, citing *Beaufort v. Neeld*, 12 Cl. & F. 248; *Smith's case*, L. R. 2 Ch. Ap. 613; *Denton v. Macneil*, L. R. 2 Eq. 352. As to errors of law, see *supra*, §§ 198-9.

ment of his opinion that the bonds were legal would not avoid the contract, since this is an open matter in respect to which each party must depend upon his own inquiries. It would be different, however, if a party should falsely say, "there has been a decision of the supreme court validating these bonds." Again, a non-specialist is not expected to know the law, and his statement of the law, therefore, is regarded as merely conjectural, not binding him. A specialist, on the other hand, who fraudulently makes a false statement of title, exposes himself to an action for deceit. And so a general false statement that a certain class of persons have particular legal prerogatives cannot be regarded as a fraudulent false representation, though it would be otherwise if a certain person (*e. g.*, a woman claiming to be married) is averred to have these prerogatives. In other words, a general misstatement of the law is not a false pretence, since law, in this sense, it is the duty of all persons to know.<sup>1</sup> Hence a contract will not be rescinded in consequence of an erroneous construction of a document given by the party claiming to enforce it, unless it should appear that the party giving the construction gave it as a specialist, and that the object of the misstatement was to defraud, or that the terms construed belonged to a foreign law of which the party speaking claimed special knowledge.<sup>2</sup>

<sup>1</sup> *Supra*, §§ 198-9; Kerr on Fraud and Mistake, 90; Leake on Contracts, 182; Bispham's Eq. § 212; Cooper v. Phibbs, L. R. 2 H. L. 170; R. v. Simmonds, 4 Cox C. C. 277; R. v. Davis, 11 Cox C. C. 181; Rashdall v. Ford, L. R. 2 Eq. 750; Hirschfield v. R. R., L. R. 2 Q. B. D. 1; Bank U. S. v. Daniel, 12 Pet. 32; Upton v. Trebilcock, 91 U. S. 45; Ogilvie v. Ins. Co., 22 How. 380; Grant v. Grant, 56 Me. 573; Pinkham v. Gear, 3 N. H. 163; Starr v. Bennett, 5 Hill, 303; Com. v. Henry, 22 Penn. St. 253; Ætna Ins. Co. v. Reed, 33 Oh. St. 283; Clem v. R. R., 9 Ind. 488; Parker v. Thomas, 19 Ind. 213; Rogers v. Place, 29 Ind. 577; Fish v. Cleland, 33 Ill. 238; Drake v. Latham, 50 Ill. 270; Town-

send v. Cowles, 31 Ala. 428; Cowles v. Townsend, 37 Ala. 77; Martin v. Wharton, 38 Ala. 637; Beall v. McGehee, 57 Ala. 438; People v. San Francisco, 27 Cal. 655. That knowledge of the applicatory home law (though not of foreign law) is always presumed, see Wh. on Ev. § 1241; *supra*, §§ 198-9.

<sup>2</sup> Lewis v. Jones, 4 B. & C. 506; Rashdall v. Ford, L. R. 2 Eq. 750; Hunter v. Walters, L. R. 7 Ch. 75; Russell v. Branham, 8 Blackf. 277; Smither v. Calvert, 44 Ind. 242; Craig v. Hobbs, 44 Ind. 363; Bacon v. Markley, 46 Ind. 116; Clodfelter v. Hulett, 72 Ind. 137; Hawkins v. Hawkins, 50 Cal. 558; Am. Ins. Co. v. Capps, 4 Mo. Ap. 571.

And where an agent claims authority by virtue of his office to do certain acts, the extent of his power being a matter of general law within the knowledge of the party whom he addresses, the former is not liable for an opinion as to his power given to the latter.<sup>1</sup> But when a person, claiming either to be a specialist or to represent the opinions of a specialist, misrepresents the law for the purposes of fraud, then he becomes responsible in an action for deceit, if the other party does not rescind.<sup>2</sup> This rule has been held to apply in a case in which an old resident, professing to be familiar with land titles, imposed upon an immigrant, just arrived, by a false representation of title.<sup>3</sup> And a party to a written contract, claiming to have special knowledge of the meaning of words used in it, is liable for fraud in misrepresenting them to the other party, who was ignorant of their true meaning.<sup>4</sup> The same liability is imposed when the false representation is by a party occupying a special position of trust;<sup>5</sup> and when a document is surreptitiously substituted for that which the party signing intended to sign, provided no negligence is imputable to him.<sup>6</sup>

Marriage  
voidable  
when made  
under mis-  
take as to  
person.

§ 265. Marriage, though founded on contract, is a fundamental institution whose modification is not within the power of individuals, nor, internationally, of particular states. A marriage, to

<sup>1</sup> *Beattie v. Ebury*, L. R. 7 Ch. 777; 7 H. L. 102.

<sup>2</sup> *Hirschfield v. R. R.*, L. R. 2 Q. B. D. 1; *Montrion v. Jefferys*, 2 C. & P. 113; *Byers v. Daugherty*, 40 Ind. 198; *Miller v. Proctor*, 20 Oh. St. 442; *Brown v. Rice*, 26 Grat. 467; *Townsend v. Cowles*, 31 Ala. 428; *Jones v. Austin*, 17 Ark. 498.

<sup>3</sup> *Moreland v. Atchison*, 19 Tex. 303.

<sup>4</sup> *Calkins v. State*, 13 Wis. 389.

<sup>5</sup> *Story*, Eq. § 130; *Shaeffer v. Sleade*, 7 Blackf. 178; *State v. Holloway*, 8 Blackf. 45; *Peter v. Wright*, 6 Ind. 183; *Cooke v. Nathan*, 16 Barb. 342; *Moreland v. Atchison*, 19 Tex. 303; *supra*, § 254.

<sup>6</sup> *Supra*, §§ 185, 205; *Wh. on Ev.* § 931; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Haigh v. Kaye*, L. R. 7 Ch. 469; *Chapman v. Rose*, 56 N. Y. 137; *Christ v. Dffenbach*, 1 S. & R. 464; *Fulton v. Hood*, 34 Penn. St. 365; *Green v. North Buffalo*, 56 Penn. St. 110; *Wharton v. Douglass*, 76 Penn. St. 273; *Gibbs v. Linabury*, 22 Mich. 479; *Terry v. Tuttle*, 24 Mich. 206; *Kellogg v. Steiner*, 29 Wis. 626; *Nance v. Lary*, 5 Ala. 370; *Shirts v. Overjohn*, 60 Mo. 305; and cases cited *supra*, § 185. As to signature to wrong document, see *supra*, § 185. As to negligence in such cases of party imposed on, see *supra*, § 185.



be binding, must be of competent persons for life; and a sexual union dissoluble at will, or for a term of years, no matter what may be the terms applied to it by the parties, is not a marriage. Nor does the well-being of society permit that marriages should be dissolved by agreement, nor that one party to a marriage should be permitted to recover damages from the other for breach of the marriage contract.<sup>1</sup> By the law of nations, also, based, in this respect, on the necessities of society, mistakes of one party as to the qualifications of another are no ground for dissolving marriages of competent parties when such mistakes do not go to identity. No matter how grossly one party (with this limitation) may deceive the other by false representations of property or standing, this will not avoid a marriage induced by such false representations.<sup>2</sup> Nor is a marriage avoided by the fact that one party imposed on the other by a forged license, or by false publication of banns, supposing this does not by statute work an avoidance.<sup>3</sup> But where a marriage was the result of a conspiracy for fraudulent purposes, the object being to impose the woman as a pauper on a particular town, she assenting under the effect of false pretences, it was declared void.<sup>4</sup>—The prevalent opinion in England is, that ante-nuptial incontinence on the part even of the woman is no ground for either declaring the marriage null, or for granting a divorce.<sup>5</sup> In Maryland, divorce is by statute authorized when the woman has before marriage been guilty of illicit intercourse with another man;<sup>6</sup> and in Virginia, when the woman was a prostitute before the marriage.<sup>7</sup> In Massachusetts, under a special statute

<sup>1</sup> Wh. Con. of L. § 126.

<sup>4</sup> Barnes v. Wyeth, 28 Vt. 41.

<sup>2</sup> Ibid.; Swift v. Kelly, 3 Knapp, 257, 293; Bishop, Mar. and Div. 6th ed. i. §§ 205, 252, 355; Clark v. Field, 13 Vt. 460; Scott v. Shufeldt, 5 Paige, 43; Robertson v. Cole, 12 Tex. 356.

<sup>5</sup> Graves v. Graves, 3 Curt. Ec. 237; 7 Eng. Ec. 425; Best v. Best, 1 Add. Ecc. 411; 2 Eng. Ec. 158; Reeves v. Reeves, 2 Phill. 125, 127. To this effect see Leavitt v. Leavitt, 13 Mich. 452 (though see Dawson v. Dawson, 13 Mich. 335); Wier v. Still, 31 Iowa, 307; Schouler, Husb. and Wife, § 27.

<sup>3</sup> Supra, § 180; R. v. Wroxtton, 4 B. & Ad. 640; Dormer v. Williams, 1 Curteis, 870; Clowes v. Clowes, 3 Curteis, 185; Lane v. Goodwin, 4 Q. B. 361. The question, however, is one regulated by local statute, Bishop, Mar. and Div. 6th ed. § 167.

<sup>6</sup> 1 Md. Code of 1860, § 25.

<sup>7</sup> Code of 1860, § 6. See Bishop, Mar. and Div. 6th ed. § 180.

authorizing decree of nullity in cases of fraud, nullity was decreed in a case where a young man was fraudulently induced to marry a pregnant woman much older than himself.<sup>1</sup> And we may regard it as settled law that, where a woman with child by another man marries without notice of this fact a man supposing her to be chaste, this is a fraud which entitles the party imposed upon to have the marriage decreed null,<sup>2</sup> though this does not hold good in cases where the man had sexual intercourse with the woman prior to marriage.<sup>3</sup> But while (with this single exception) a marriage is not invalidated by the fact that it was induced by false representations, it is otherwise when there is an entire mistake as to the person. If A. should marry B. supposing B. to be C., the marriage would be void; there is no consent by A. to a marriage with B., and therefore no marriage between A. and B.<sup>4</sup>—An action of deceit may be maintained by a woman against a man who fraudulently induces her to contract with him a void marriage.<sup>5</sup>

§ 266. Either party to a marriage may, prior to the marriage, make a settlement of property in such a way as to withdraw it from the control of the other party.<sup>6</sup> But a woman's settlement of her property, in anticipation of her marriage, is invalid, if the fact be fraudulently withheld from the husband.<sup>7</sup> Fraud, in such cases, as in most other cases, need not be expressly shown;

Fraudulent marriage settlement may be set aside.

<sup>1</sup> Reynolds v. Reynolds, 3 Allen, 605. To the effect that fraud under such circumstances may avoid, see Montgomery v. Montgomery, 3 Barb. Ch. 132; Ritter v. Ritter, 5 Blackf. 81.

<sup>2</sup> Wald's Pollock, 494, citing Donovan v. Donovan, 9 Allen, 140; Carris v. Carris, 24 N. J. Eq. 516; Morris v. Morris, Wright, Oh. 630; Baker v. Baker, 13 Cal. 87. See to this effect Page on Div. 161; and cf. criticisms in Bishop, Mar. and Div. 6th ed. i. §§ 167, 191, 291; ii. 291; contra, Long v. Long, 77 N. C. 304.

<sup>3</sup> Crehore v. Crehore, 197 Mass. 330;

Moss v. Moss, 2 Ired. 55. See *supra*, § 180.

<sup>4</sup> Swift v. Kelly, 3 Knapp, 257.

<sup>5</sup> Blossom v. Barrett, 37 N. Y. 434.

<sup>6</sup> *Infra*, § 399, and cases there cited.

<sup>7</sup> Goddard v. Snow, 1 Russ. Ch. 485; Wrigley v. Swainson, 3 De G. & S. 458; Strathmore v. Bowes, 2 Cox, 28; S. C., 2 Brown C. C. 345; Duncan's App. 43 Penn. St. 67; Gregory v. Winston, 23 Grat. 102; Freeman v. Hartman, 45 Ill. 57; Tisdale v. Bailey, 6 Ired. Eq. 358; Baker v. Jordan, 73 N. C. 145; Jordan v. Black, Meigs, 142.

it is to be inferred from all the facts of the case.<sup>1</sup> And a conveyance by the man, on the eve of marriage, for the purpose of defrauding his intended wife of dower, may in like manner be voidable by her.<sup>2</sup>

§ 267. It is one of the incidents of sales by auction that the thing exposed should be sold to the highest bidder; and unless there is a condition stated at the time that the vendor reserves a right to bid, or that a fixed price is limited, below which the thing will not be allowed to go, it is a fraud for the vendor or the auctioneer to employ puffers to bring up the price. If this is done, it should be announced, and the suppression of the fact is equivalent to a fraudulent representation. Hence it has been held that the employment, without notice to *bona fide* bidders, of a puffer by whom the thing is bid up on the owner's account, avoids the sale as to a *bona fide* purchaser at his election.<sup>3</sup> Bids by the auctioneer, as the vendor's agent, have the same effect.<sup>4</sup> The English equity courts at one time seemed to hold that a single bidder might be employed by the owner, without notice, to bid up the property to a fixed price; and that the interposition of such a bidder, being an understood thing, did not avoid a sale, though the bidder so interposed took part in raising the price and in getting up a delusive appearance of competition.<sup>5</sup> This view has been followed in several cases in this country, chiefly on the ground that the presence of an agent of the owner to bring the prop-

Employment of puffer at auction may be a fraud.

<sup>1</sup> *Supra*, § 239; Taylor v. Pugh, 1 Hare, 608.

<sup>2</sup> Leach v. Duvall, 8 Bush, 201; see Littleton v. Littleton, 1 Dev. & B. 327, and cases cited *infra*, § 399.

<sup>3</sup> Kerr on Fraud and Mistake, 225; Bispham's Eq. § 209; Story's Eq. 12th ed. § 202; Green v. Baverstock, 14 C. B. N. S. 204; Wheeler v. Collier, M. & M. 123; Gilliat v. Gilliat, L. R. 9 Eq. 60; Veazie v. Williams, 8 How. 134; Towle v. Leavitt, 3 Foster, 360; Faucett v. Currier, 115 Mass. 20; Trust v.

Delaplaine, 3 E. D. Smith, 219; Staines v. Shore, 16 Penn. St. 200; Walsh v. Barton, 24 Oh. St. 28; Darst v. Thomas, 87 Ill. 222; McDowell v. Simms, 6 Ired. Eq. 278; Woods v. Hall, 1 Dev. Eq. 411; Baham v. Bach, 13 La. 287; though see Bank of the Metropolis v. Sprague, 20 N. J. Eq. 159.

<sup>4</sup> Parfitt v. Jepson, 46 L. J. C. P. 529; Veazie v. Williams, 8 How. 134; Leake, 2d ed. 367.

<sup>5</sup> Smith v. Clarke, 12 Ves. 483; Flint v. Woodin, 9 Hare, 618.

erty up to a reasonable price is an understood right.<sup>1</sup> But the great preponderance of American authority is to the effect that the use of pretended bidders, in the guise of *bona fide* bidders, entitles *bona fide* bidders who are thus imposed upon to throw up the purchase.<sup>2</sup> In the English courts the relaxation of the rule was not permanently accepted, even by the courts by whom it was at first approved;<sup>3</sup> and now, by act of parliament, the common law rule is established in equity as well as in law. The rule is thus judiciously stated in the Indian Contract Act: "If at a sale by auction the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer."<sup>4</sup> If the vendor desires to avoid a sacrifice, this is to be done by withdrawing the thing to be sold if a fixed price is not reached, not by employing fictitious bidders.<sup>5</sup> At the same time, when no harm has been done by the presence and interposition of a puffer, a sale will not be set aside.<sup>6</sup> The rule applies, it is said, to judicial sales.<sup>7</sup> But when the fact of an interposition of this kind is discovered, the purchaser must act promptly, and return the property, in order to rescind.<sup>8</sup>

<sup>1</sup> See note to Benj. on Sales, 3d Am. ed. § 474; *Veazie v. Williams*, 3 Story, 622 (overruled, 8 How. 134); *Phippen v. Stickney*, 3 Met. 387; *Wolf v. Lyster*, 1 Hall, 146; *Steele v. Ellmaker*, 11 S. & R. 86; *Pennock's App.* 14 Penn. St. 446; *Moncrieff v. Goldsbrough*, 4 H. & McH. 282; *Walsh v. Barton*, 24 Oh. St. 28; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Woods v. Hall*, 1 Dev. Eq. 411; *Lee v. Lee*, 19 Mo. 420; *Reynolds v. Dechaums*, 24 Tex. 174.

<sup>2</sup> See cases cited *supra*.

<sup>3</sup> *Mortimer v. Bell*, L. R. 1 Ch. Ap. 12; *Woodward v. Miller*, 2 Coll. 279.

<sup>4</sup> *Wald's Pollock*, 493.

<sup>5</sup> *Bispham's Eq.* § 209.

<sup>6</sup> *Jennings v. Hart*, 1 Rus. & Cl. (N. S.) 15; *Veazie v. Williams*, 3 Story, 611; *Tomlinson v. Savage*, 6 Ired. Eq. 430; cited Benj. on Sales, 3d Am. ed. § 470; and see Story's Eq. Jur. 12th

ed. § 201; *Nat. Fire Ins. Co. v. Loomis*, 10 Paige, 431; *Latham v. Morrow*, 6 B. Mon. 630. See *supra*, § 25 b. And see generally as to the questions in the text, *Thornett v. Haines*, 15 M. & W. 367; *Veazie v. Williams*, 3 Story, 611; 8 How. 134; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Pennock's App.*, 14 Penn. St. 446. As to liability of auctioneer when participating in fraud see *Heatley v. Newton*, L. R. 19 Ch. D. 326; 45 L. T. N. S. 455, where it was held that the plaintiff, who bid at a sale at which the auctioneer and the vendor's agent bid up the property between them, could recover back his deposit with interest, though the vendor had reserved the right of bidding.

<sup>7</sup> *Dimmock v. Hallett*, L. R. 2 Ch. App. 21; *Lee v. Lee*, 19 Mo. 420.

<sup>8</sup> *Veazie v. Williams*, 3 Story, 611; *Stables v. Shore*, 16 Penn. St. 200;

§ 268. Fair competition being an essential ingredient of sale by auction, a sale will be set aside if by means of false representations parties at the sale were deterred from bidding, and the property was thus sacrificed.<sup>1</sup>—If the buyer hold himself out as buying on a particular trust, that trust may be enforced.<sup>2</sup>—As will hereafter be seen, agreements to suppress competition at auction cannot be enforced as between the parties.<sup>3</sup>

Vendor may set aside auction sale if bidders were kept back.

§ 269. An agent's statements during a negotiation bind a principal as much as would his own statements. They are primary evidence, which it is not necessary to call the agent to verify.<sup>4</sup> Nor is it necessary that the representations should have been specifically authorized by the principal. They may have been made contrary to his directions, yet he will be bound by them if they were made within the apparent range of the authority with which the agent was intrusted. As to parties without knowledge of such restrictions, the agent binds the principal.<sup>5</sup>

Agent's statements during negotiation bind principal.

*Backenstoss v. Stahler*, 33 Penn. St. 251; *McDowell v. Simms*, 6 Ired. Eq. 278; and cases cited *Benj. on Sales*, 3d Am. ed. § 470.

<sup>1</sup> *Levi v. Levi*, 6 C. & P. 239; *Fuller v. Abrahams*, 3 B. & B. 116; *Cocks v. Izard*, 7 Wal. 559; and cases cited *infra*, § 443.

<sup>2</sup> *Bispham's Eq.* § 210, citing *Ryan v. Dox*, 34 N. Y. 307; *Brown v. Dysinger*, 1 Rawle, 408; *Hayman's App.*, 65 Penn. St. 433; *Cook v. Cook*, 69 Penn. St. 443; *Bethel v. Sharp*, 25 Ill. 173; *Grumley v. Webb*, 44 Mo. 444.

<sup>3</sup> *Infra*, § 443.

<sup>4</sup> *Supra*, § 132; *Hern v. Nichols*, 1 Salk. 289; *R. v. Hall*, 8 C. & P. 358; *Fountaine v. R. R.*, L. R. 5 Eq. 316; *Mortimer v. McCallan*, 6 M. & W. 58; *Mechanics' Bk. v. Bk. of Columb.*, 5 Wheat. 336; *Cliquot's Champagne*, 3 Wall. 114; *Demeritt v. Meserve*, 39 N. H. 521; *Barber v. Britton*, 26 Vt. 112; *Baring v. Clark*, 19 Pick. 220; *Bird v. Daggett*, 97 Mass. 494; *Willard v.*

*Buckingham*, 36 Conn. 395; *New York etc. R. R. v. Schuyler*, 34 N. Y. 30; *Marsh v. Falker*, 40 N. Y. 562; *Anderson v. R. R.*, 54 N. Y. 334; *Dean v. Ins. Co.*, 62 N. Y. 642; *Penns. R. R. v. Plank Road*, 71 Penn. St. 350; *Columbia Ins. Co. v. Masonheimer*, 76 Penn. St. 138; *Sturges v. Bank*, 11 Oh. St. 153; *Globe Ins. Co. v. Boyle*, 21 Oh. St. 119; *Cont. Ins. Co. v. Kasey*, 25 Grat. 268; *Mut. Ins. Co. v. Cannon*, 48 Ind. 265; *Wheeler v. Randall*, 48 Ill. 182; *Chicago R. R. v. Lee*, 60 Ill. 501; *Pinnix v. McAdoo*, 68 N. C. 56; *Baldwin v. Ashley*, 54 Ala. 82; *Peck v. Ritchey*, 66 Mo. 114; *Henderson v. R. R.*, 17 Tex. 560.

<sup>5</sup> *Barwick v. Joint Stock Co.*, L. R. 2 Exc. 259; *Maddick v. Marshall*, 17 C. B. (N. S.) 829; *Howard v. Sheward*, L. R. 2 C. P. 148; *Burnham v. R. R.*, 63 Me. 298; *Lobdell v. Baker*, 1 Met. (Mass.) 193; *Mundorff v. Wickersham*, 61 Penn. St. 87. That corporations are so liable, see *supra*, § 130.

§ 270. An agent's false statement, made within the range of his duties, is imputable to his principal, though the statement was not authorized by the principal, and though the agent may not have been aware of the falsity.<sup>1</sup> It is true that this was once questioned in England, in a case where the false statement was made innocently and ignorantly,<sup>2</sup> but the liability, in all cases where the agent is at the time engaged in performing the duties of his agency, and where the false statement falls within his authority, is no longer doubted.<sup>3</sup> The question then is, Was the statement within the range of the agent's authority? If so, the principal, whether a natural person or a corporation, is not only bound contractually by the statement, but is liable for it in an action for deceit; and the other contracting party is as much entitled to rescind, when the false statements are thus made within the range of the agent's authority, as he would be had they been made directly by the principal himself.<sup>4</sup> And, in any view, a principal who adopts

<sup>1</sup> Wh. on Agency, §§ 129, 158, 454, 708 *et seq.*

<sup>2</sup> *Cornfoot v. Fowke*, 6 M. & W. 358, discussed *supra*, § 214.

<sup>3</sup> 2 Sm. Lead. Cases, 7th Am. ed. 1070. *Cornfoot v. Fowke*, Mr. Pollock tells us (3d ed. 543), "has been practically overruled by the remarks since made upon it;" citing Willes, J., in *Barwick v. English Joint Stock Bk.*, L. R. 2 Ex. 262. To same effect see Wh. on Agency, § 168; *Benj. on Sales*, § 462; *Nat. Ex. Bk. v. Drew*, 2 Macq. 103; *Wheelton v. Hardisty*, 8 E. & B. 270; *Ludgater v. Love*, 44 L. T. N. S. 694, *infra*; and criticisms *supra*, § 214.

<sup>4</sup> Wh. on Agency, §§ 168 *et seq.*; *Barwick v. English Joint Stock Bk.*, L. R. 2 Ex. 259; *Mackay v. Comm. Bk.*, L. R. 5 P. C. 394; *Swire v. Francis*, L. R. 3 Ap. Cas. 106; *Houldsworth v. Bk.*, L. R. 5 App. Cas. 317; *Brett v. Clowson*, L. R. 5 C. P. D. 376; *Veazie v. Williams*, 8 How. 134; *Ferson v. Sanger*, 1 Wood. & M. 147; *Hamnett v.*

*Emerson*, 27 Me. 308; *Burnham v. R.*, 63 Me. 298; *Presby v. Parker*, 56 N. H. 409; *Fitzsimmon v. Joslin*, 21 Vt. 129; *Fogg v. Griffin*, 2 Allen, 1; *White v. Sawyer*, 16 Gray, 586; *Bennett v. Judson*, 21 N. Y. 238; *Griswold v. Haven*, 25 N. Y. 595; *Allerton v. Allerton*, 50 N. Y. 670; *Indianap. R. v. Tyng*, 63 N. Y. 653; *Mundorff v. Wickersham*, 61 Penn. St. 87; *Tome v. R. R.*, 39 Md. 36; *Lamm v. Port Deposit Co.*, 49 Md. 233; *De Voss v. Richmond*, 18 Grat. 338; *Madison R. v. Saving Co.*, 24 Ind. 457; *Rockford, etc. R. R. v. Shunick*, 65 Ill. 224; *Durant v. Rogers*, 87 Ill. 508; *Reed v. Peterson*, 91 Ill. 288; *Law v. Grant*, 37 Wis. 548; *Scofield Co. v. State*, 54 Ga. 635; *Lawrence v. Hand*, 23 Miss. 103; *Henderson v. R. R.*, 17 Tex. 560; *Morton v. Scull*, 23 Ark. 289. That *Coddington v. Goddard*, 16 Gray, 436, does not practically dissent from the rule in the text, see Wh. on Agency, § 170. "The rule of law is,

the benefits of an agent's bargain, adopts the misrepresentations by which that bargain was produced.<sup>1</sup>—It may also be stated, that if A. makes a false statement to B. intending it to be communicated to C., whereby C. is induced to part with money to A., A. is liable to C. for damages.<sup>2</sup> But in such case authority from A. to B. must be shown.<sup>3</sup> An agent's fraudulent misstatements, however, when outside the range of his duties, and when unauthorized by his principal, though

that if an agent is guilty of fraud in transacting his principal's business, the principal is responsible" (Parke, B., *Murry v. Mann*, 2 Ex. 540); for the fraud of the agent who makes the contract is the fraud of the principal. Per cur. in *Wheelton v. Hardisty*, 8 E. & B. 260; *Brookwell's case*, 4 Drew. 212; *Hern v. Nichols*, 1 Salk. 289; *Attwood v. Small*, 6 Cl. & F. 232. And this "although the misrepresentation has been made without the authority of the principal, and without his knowledge." Leake, 2d ed. 384, citing *Udell v. Atherton*, 7 H. & N. 172; *Barwick v. Bank*, L. R. 2 Ex. 259; *Mackay v. Bank*, L. R. 5 P. C. 394; *Weir v. Barnett*, L. R. 3 Ex. D. 32.

<sup>1</sup> Sug. V. & P. 381; *Perry on Trusts*, § 211; Wh. on Ag. §§ 158 *et seq.*; *Wilson v. Fuller*, 3 Ad. & El. (N. S.) 58; *Irving v. Motley*, 7 Bing. 543; *Mason v. Crosby*, 1 Wood. & M. 342.

<sup>2</sup> *Watson v. Crandall*, 7 Mo. Ap. 233.

In *Ludgater v. Love*, 44 L. T. N. S. 694, decided Jan. 1881 by the court of appeals, before Lord Selborne, C., and Baggallay and Brett, L. JJ., the defendant's son, acting for the defendant, and with the defendant's authority, represented that certain sheep, which he sold to the plaintiff, were all right. The defendant had fraudulently concealed from his son that the sheep had the rot, and fraudulently gave the son authority to sell them for the best price, intending that the son should represent that they were sound. It was held, that the defendant was liable in an action to re-

cover damages for fraudulent misrepresentation.

Brett, L. J., said: "We were on the hearing clearly of opinion that there was ample evidence to justify a finding of fraudulent intention in the defendant; and that the admitted truthfulness of the plaintiff justified the jury in finding, as we think they did, that the plaintiff was induced to purchase by the representation that the sheep were all right. We took time to consider the questions which were discussed as to whether there was such authority from the defendant to his son as was sufficient to bind him by reason of his son's representations to a liability to pay damages in an action for deceit. These questions were to be determined, as it seemed to us, upon the finding of fraud in the father without a finding of fraud in the son. If the son was authorized to make the representations, whether such authority was express or implied, we are of opinion that the defendant was, by reason of his own fraudulent mind, liable, notwithstanding want of fraud in the son. We are of this opinion, notwithstanding the decision in *Cornfoot v. Fowke* (*ubi sup.*), if that decision is contrary to this view. Several of the propositions, however, enunciated as to the authority to be implied, seemed to us to raise questions of considerable difficulty; but, upon consideration, we are of opinion that it is not necessary to determine them."

<sup>3</sup> *Supra*, § 247.

if negligently adopted they may be ground for rescission,<sup>1</sup> do not expose the principal to an action for deceit.<sup>2</sup>

<sup>1</sup> *Supra*, § 214.

<sup>2</sup> *Udell v. Atherton*, 7 H. & N. 172; *Western Bank v. Addie*, L. R. 1 Sc. App. 146; *Kennedy v. McKay*, 43 N. J. L. 288. In this case Beesley, C. J., said: "On the ground thus assumed, then, the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights, under the given circumstances, of both vendor and vendee, have been plainly defined, and, as I think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has at law two and only two remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent founded on the deceit. But in such a posture of affairs a suit based on the fraud will not lie against the innocent vendor on account of the deceit practised without his authority or knowledge by his agent. If the situation is such that the vendee can make complete restitution so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong so that he can be

sued for the deceit. This is the doctrine declared with much clearness and force by Barons Bramwell and Martin in the case of *Udell v. Atherton*, 7 H. & N. 172, and their views on this subject were concurred in and the principle propounded by them adopted and enforced by the house of lords in *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 146. In this latter case the action was against the bank for deceit, which was alleged to consist in certain fraudulent representations, charged to have been made on a sale of stock to the plaintiffs by the director of such corporation as its agents. Lord Chelmsford, in giving his views, said: 'The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought in the name of the company to seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers to bring an action of damages for the deceit, such an action cannot be sustained against the company, but only against the directors personally.' Lord Cranworth, in his opinion, puts himself on the same



§ 271. A statement by an agent may be either non-contractual or contractual. It is non-contractual when it is made by the agent casually, and not as part of a negotiation, but as narrating an incident, or as explaining an alleged right. In such cases, it is put in evidence, not as part of a contract, but as explanatory of the transaction to which it relates, in the same way and under the same limitations as are admissions of the party himself as to the nature of the transaction in question. To render admissible an agent's admissions of this class, the agent must be either the principal's general representative, or must be specially delegated to speak as to the particular matter.<sup>1</sup> When the statement is offered as contractual (*i. e.*, as made as one of the inducements to a contract), it must be shown to have been made during the negotiations. Otherwise, it cannot be received as determining the principal's liability.<sup>2</sup> The same limitation excludes representations made to third persons, in different transactions, or even to the other contracting party, when not made as part of the particular negotiation. Even prior statements by a general agent are not contractually imputable to the principal unless they be shown to have been inducements to the contract forming the basis of the suit against the principal.<sup>3</sup>

Statements if contractual, must be coincident with transaction

ground, and says: 'A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.'"

<sup>1</sup> Wh. on Ev. § 1177.

<sup>2</sup> *Hern v. Nichols*, 1 Salk. 289; *Fairlie v. Hastings*, 10 Ves. 125; *Kirkstall Co. v. R. R.*, L. R. 9 Q. B. 468; *Stiles v. R. R.*, 8 Met. 44; *Lowell Bk. v. Winchester*, 8 Allen, 109; *Clark v. Baker*, 2 Whart. 340; *Penn. R. R. v. Books*, 57 Penn. St. 339; *McCracken v. West*, 17 Ohio, 16; *Chic. B. & Q. R. R. v. Riddle*, 60 Ill. 534; *Bowen v. School Dist.*, 36 Mich. 149; *Williams*

*v. Williamson*, 6 Ired. L. 281; *McComb v. R. R.*, 70 N. C. 178.

<sup>3</sup> In *Western Bk. of Scotland v. Addie*, L. R. 1 Sc. & D. 145, as stated by Mr. Pollock, "the directors of the bank had made a series of flourishing, but untrue reports on the condition of its affairs, in which bad debts were counted as good assets. The shareholder who sought relief in the action, had taken additional shares on the faith, as he said, of these reports. But it was not shown that they were issued or circulated for the purpose of inducing existing shareholders to take more shares, or that the local agent of the bank who effected this particular sale of shares, used them, or was autho-

§ 272. An agent's statement made while representing his principal in a business negotiation binds, as has been seen, his principal; and in torts his declarations coincident with the act charged as tortious are imputable to the principal as defining the principal's liability.<sup>1</sup> But such statements, to be admissible against the alleged principal, must be made by a general agent, or, if by a special agent, must be shown to have been within the range of such agent's authority, or as part of the *res gestæ*, or to have been ratified by the principal.<sup>2</sup>

§ 273. This liability is not affected by the fact that the representations were put in the shape of reports by agents of the corporation to the corporation, when the reports are published by the corporation as its own.<sup>3</sup> "If reports," so is the rule stated by Lord Westbury, "are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated; misrepresentations contained in those reports must undoubtedly be taken, after their adoption, to be representations and statements made with the authority of the company, and therefore binding on the company." And Lord St. Leonards says:<sup>4</sup> "I have certainly come to this conclusion, that, if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third

rized to use them for that purpose. Thus, the case rested only on the purchaser having acted under an impression derived from these reports at some former time; and that was not such a direct connection between the false representation and the conduct induced by it as must be shown in order to rescind a contract." See *supra*, § 237. On this point see *Eaton v. Avery*, 83 N. Y. 31, cited *infra*, § 279.

<sup>1</sup> Wh. on Ev. §§ 1173-4.

<sup>2</sup> Wh. on Agency, § 164. The statement of the Indian Contract Act, s. 238 (Wald's Pollock, 503), is as fol-

lows: "Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such representations or frauds had been committed by the principals; but misrepresentations made, or frauds committed by agents in matters which do not fall within their authority, do not affect their principal." *Supra*, § 269.

<sup>3</sup> New Brunswick, etc. Co. v. Conybeare, 9 H. L. C. 725.

<sup>4</sup> Nat. Ex. Co. of Glasgow v. Drew, 2 Macq. 103.

person to purchase stock, these representations so made by them do bind the company. I consider representations of the directors of a company as representations by the company; and, although they may be representations made to the company, it is their own representation."<sup>1</sup>

§ 274. A party who commits the management of his whole business, or of a particular line of his business, to an agent, is bound by the admissions of his agent, as to the entire business committed to him; nor, when the agent is the principal's general and continuous representative, is it necessary for the admission of such declarations that they should either have been part of the *res gestæ*, or should have been specially authorized.<sup>2</sup>

General agents may make contractual admissions.

§ 275. As a corporation can only act through agents, it is necessarily bound by the contractual representations of its agents. While a contract obtained by false representations can be rescinded as against a corporation, a corporation cannot obtain specific performance of a contract induced by the false statements of its agents; and a corporation is liable in an action of deceit for its agent's false representations by which other parties are injured.<sup>3</sup> Hence, "if the directors or agents of the company, in the course of their duties or employment, issue a prospectus

Corporations are necessarily so bound.

<sup>1</sup> That when an agent ignorantly makes a false statement of which the principal knows the falsity, the principal cannot enforce a bargain thus induced, see Wh. on Agency, § 167; that the agent's false representations are imputable to principal, so as to expose the latter to an action for deceit, see Wh. on Agency, §§ 171, 478.

<sup>2</sup> Wh. on Ev. § 1177, citing *Kirkstall Co. v. R. R.*, L. R. 9 Q. B. 468. This is eminently the case with corporations, which can only act through agents. *Dowdall v. R. R.*, 13 Blatch. 403; *Morse v. R. R.*, 6 Gray, 450; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Custar v. Gas Co.*, 63 Penn. St. 381; *Charleston R. R. v. Blake*, 12 Rich. S. C. 634; *Northrup v. Ins. Co.*, 47 Mo. 435.

<sup>3</sup> *Supra*, §§ 130 *et seq.* 133; *Green's Brice Ultra Vires*, 425; *Houldsworth v. Bk.*, L. R. 5 App. Ca. 317; *Charles v. Brunswick Benefit Co.*, L. R. 5 C. P. D. 331; *Nat. Ex. Co. v. Drew*, 2 Macq. 103; *Ranger v. R. R.*, 5 H. L. C. 72; *Mackay v. Bank*, L. R., 5 P. C. 394; *Barwick v. Bk.*, L. R. 2 Ex. 259; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Mechanic's Bk. v. Bk. of Columbia*, 5 Wheat. 336; *McGenness v. Adriatic Mills*, 116 Mass. 177; *New Y. & N. H. R. R. v. Schuyler*, 34 N. Y. 30; *Anderson v. R. R.* 54 N. Y. 344; *Indian R. R. v. Tyng*, 63 N. Y. 653; *Penn. R. R. v. Plank Road*, 71 Penn. St. 350; *Columbia Ins. Co. v. Masonheimer*, 76 Penn. St. 138; *Globe Ins. Co. v. Boyle*, 21 Oh. St. 119.

or report, or other document inviting subscription for shares, which contains fraudulent misrepresentations, the shareholders who have been induced thereby to take shares are entitled to avoid their contracts with the company."<sup>1</sup>

§ 276. A party (whether a corporation or a natural person) issuing a prospectus for a proposed business adventure, is bound to make no statements of facts that cannot be substantially sustained; and while latitude is allowed in the statement of opinion, if there be a material misrepresentation of facts shareholders contracting directly with the party making the misstatement, are entitled to have their contracts rescinded.<sup>2</sup>—That a party buying in open market from one of the original stockholders, is not entitled to recover on such a prospectus, is settled in England;<sup>3</sup> though in this country there are cases in which this limitation is not recognized.<sup>4</sup>

§ 277. As has been just noticed, a corporation is liable for such misstatements of its agents as were made within the range of their authority, although such misstatements were not specifically authorized by it.<sup>5</sup> A director or manager of such corporation, however, is not personally liable for such representations, unless he authorizes them specifically, either directly or by implication.<sup>6</sup> But the agents, directors, and officers who personally express or indorse such false state-

<sup>1</sup> Leake, 2d ed. 384, citing Brockwell's case, 4 Drew. 205; Ayre's case, 25 Beav. 513; New Brunswick, etc. R. v. Conybeare, 9 H. L. C. 711; Mackay v. Bank, L. R. 5 P. C. 394; Eaglesfield v. Londonderry, L. R. 4 Ch. D. 693; Swire v. Francis, L. R. 3 App. Cas. 106, and see cases cited *supra*, §§ 130 *et seq.* 133.

<sup>2</sup> New Brunswick R. R. v. Mugeridge, 1 Dr. & Sm. 363; Central R. of Venezuela v. Kisch, L. R. 2 H. L. C. 113; Swift v. Winterbotham, L. R. 8 Q. B. 244; Paddock v. Fletcher, 42 Vt. 389; New Y. & N. H. R. R. v.

Schuyler, 34 N. Y. 30; Bruff v. Mali, 36 N. Y. 200; Suydam v. Moore, 8 Barb. 358; McClellan v. Scott, 24 Wis. 81; see fully, *supra*, § 255.

<sup>3</sup> Peek v. Gurney, L. R. 6 H. L. C. 377; *supra*, § 237.

<sup>4</sup> New Y. & N. H. R. R. v. Schuyler, 34 N. Y. 30; Bruff v. Mali, 36 N. Y. 200; Suydam v. Moore, 8 Barb. 358. See Eaton v. Avery, cited *infra*, § 279.

<sup>5</sup> *Supra*, § 131.

<sup>6</sup> Cargill v. Bower, L. R. 10 Ch. D. 502; Weir v. Barnett, L. R. 3 Ex. D. 32; aff. 3 Ex. D. 238, under name of Wier v. Ball, and cases *supra*, § 131.

ments, are personally liable for the deceit.<sup>1</sup> And in any view the corporation that takes advantage of its agent's deceit, becomes liable for it.<sup>2</sup>

§ 278. Agency cannot be established by the agent's own declarations. There must be proof *aliunde* of the agency, in order to make the agent's declarations admissible.<sup>3</sup> Thus, in an action against a railroad corporation for false representations, by which the plaintiff was induced to grant a right of way over his land, the representations of directors of the corporation cannot be put in evidence against the corporation until it is shown either that they were authorized to make these representations, or that these representations were made by them as incident to a negotiation authorized by the company.<sup>4</sup>

Agency must be established by proof *aliunde*.

§ 279. A principal is not liable for collusive contracts fraudulently concocted by his agent with third parties.<sup>5</sup> Thus, in a case before the English court of appeal, in 1881, it appeared that a contract entered into by a local board, provided that payment for the work executed thereunder, *i. e.*, the making of a reservoir, should be made by instalments upon the certificates of a certain engineer. After several payments had been made, it was discovered that the reservoir would not hold water, and further payment was refused. The contractor on this state of facts brought an action against the board for 1067*l.* 11*s.* 6*d.*, the balance due under the contract, which was stayed, however, on the board executing an agreement with

Principal not liable for collusive acts of agent, nor in deceit for agent's independent fraud.

<sup>1</sup> Wh. on Agency, §§ 540-1; Cherry *v.* Bank, L. R. 3 P. C. 24; Cullen *v.* Thomson, 4 Macq. 424; Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693; Swift *v.* Winterbotham, L. R. 8 Q. B. 244; 28 L. T. N. S. 339; Noyes *v.* Loring, 55 Me. 408; Bartlett *v.* Tucker, 104 Mass. 336; People *v.* Johnson, 12 Johns. 292; Morgan *v.* Skiddy, 62 N. Y. 319; McCurdy *v.* Rogers, 21 Wis. 197.

<sup>2</sup> See cases cited in Wh. on Agency, § 478.

<sup>3</sup> Fairlie *v.* Hastings, 10 Ves. 126; Mussey *v.* Beecher, 3 Cush. 517; Ha-

ney *v.* Donnelly, 12 Gray, 361; Fitch *v.* Chapman, 10 Conn. 8; Hill *v.* R. R., 63 N. Y. 101; Williams *v.* Davis, 69 Penn. St. 21; Grim *v.* Bonnell, 78 Penn. St. 152; Rosenstock *v.* Toomay, 32 Md. 169; Royal *v.* Sprinkle, 1 Jones, L. 505; Grandy *v.* Ferebee, 68 N. C. 356; Francis *v.* Edwards, 77 N. C. 271; Wilcoxon Co. *v.* Bohanan, 53 Ga. 219; Reynolds *v.* Ferree, 86 Ill. 570; Sypher *v.* Savory, 39 Iowa, 258.

<sup>4</sup> East Line R. R. *v.* Garrett, 52 Tex. 133.

<sup>5</sup> Wh. on Agency, §§ 122, 460.

the contractor undertaking to pay the sum of 800*l.* at the expiration of six months. The agreement was assigned by the contractor to a bank with whom he had an account, and to whom he was indebted to an amount exceeding 800*l.* Notice of the assignment was given by the bank to the board, and at the expiration of the six months the bank brought an action against the board to recover the amount secured by the agreement, when for the first time the board denied their liability on the ground that they had discovered that the contractor and the engineer had conspired together to give false certificates; and that, therefore, the agreement was one which had been obtained by fraud. It was held by the court of appeal that the defence that the agreement had been obtained by the fraud and collusion of the contractor was a good answer to the action brought against the defendants. It was further ruled that there was no obligation on the part of the defendants to give notice to the bank of the discovery of the fraud until steps were taken to enforce the agreement.<sup>1</sup> Nor, as we have seen, is a principal liable in deceit for his agent's unauthorized independent fraudulent statements in effecting a sale.<sup>2</sup> But a party who knowingly combines to defraud another by a false statement is liable to such other in an action for deceit, although it was not intended specifically to defraud the party injured, but only any one of a class on whom the fraud might operate.<sup>3</sup> It is no defence to such a

<sup>1</sup> Wakefield Banking Co. *v.* Norman-ton, 44 L. T. Rep. (N. S.) 697. That collusive settlements by architect are void, see *infra*, § 564, and see *infra*, § 402.

<sup>2</sup> Udell *v.* Atherton, 7 H. & N. 172; West Bank of Scotland *v.* Addie, L. R. 1 Sc. Ap. 145; Kennedy *v.* McKay, 43 N. J. L. 288, cited *supra*, § 270.

<sup>3</sup> *Supra*, § 232. In Eaton *v.* Avery, 83 N. Y. 31, F., a member of a partnership, made statements he knew to be false to M., the representative of a mercantile agency. The object was through the mercantile agency to ob-

tain credit from third parties whom it was intended to defraud. The statement in question was communicated to V., being one of the class designed by F. to be affected by the false statement, and V., on faith of the statement, sold goods to the partnership. It was held that V. could maintain an action for deceit against F.

That for mere expression of opinion an action for deceit cannot be maintained, see Randall *v.* Farnum, 52 Vt. 539.

That the plaintiff's ignorance and simplicity may be considered in deter-

suit that there is a warranty on which the defendant might be held liable.<sup>1</sup> Nor is it a defence that the fraud operates through a chain of intervening agencies, conscious or unconscious. Wherever there is a fraudulent intention to injure either an individual or a class of individuals, the party injured may sue the party injuring, no matter how numerous may have been the intermediate agencies through which the fraud worked.<sup>2</sup>

mining the question of causal relation under such circumstances see *supra*, § 245; *Nolte v. Reichelm*, 96 Ill. 425.

<sup>1</sup> *Supra*, §§ 218, 263; *Carter v. Glass*, 44 Mich. 154.

<sup>2</sup> *Eaton v. Avery*, 83 N. Y. 31; *supra*, § 242.

## CHAPTER XIII.

## RESCISSION : RATIFICATION.

Party deceived may rescind contract, and so when the party is unable to perform, § 282.	Party rescinding should give notice, § 287.
Contracts induced by fraud are voidable, § 283.	Ratification may be by conduct, § 288.
Election must be in reasonable time, § 284.	Mere lapse of time does not estop, § 289.
Party rescinding must do equity, § 285.	Election is final and must be single, § 290.
Rescission not granted when by complainant's laches other party is exposed to loss, § 286.	Rescission cannot be granted to impair rights of third parties, § 291.
	Party without title cannot pass title, § 292.
	Rescission may be granted on failure in part performance, § 293.

§ 282. A PARTY induced to enter into a bargain by another's fraud may either hold on to the bargain and sue for damages, or elect to rescind the bargain.<sup>1</sup>—A contract, for instance, fraudulently obtained by col-

<sup>1</sup> *Supra*, §§ 232 *et seq.*; *infra*, § 919; *Udell v. Atherton*, 7 H. & N. 181; *Smith v. Richards*, 13 Pet. 26; *Penney v. Langdon*, 99 U. S. 578; *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 691; *Doggett v. Emerson*, 3 Story, 733; *Foreman v. Bigelow*, 4 Cliff. C. C. 508; *Soper v. Stevens*, 14 Me. 133; *Wright v. Haskell*, 45 Me. 489; *Farris v. Ware*, 60 Me. 482; *Skinner v. Brigham*, 126 Mass. 132; *Addington v. Allen*, 11 Wend. 375; reversing S. C., 7 Wend. 9; *Perkins v. Partridge*, 30 N. J. Eq. 82; *Young v. Hughes*, 32 N. J. Eq. 372; *Crosland v. Hall*, 33 N. J. Eq. 11; *Bigler v. Flickinger*, 55 Penn. St. 279; *Babcock v. Case*, 61 Penn. St. 427; *Short v. Stevenson*, 63 Penn. St. 95; *Clark v. Ever-*

*hardt*, 63 Penn. St. 347; *Lowry v. McClane*, 3 Grant, 333; *Bird's App.*, 91 Penn. St. 68; *Reed v. Peterson*, 91 Ill. 288; *Bradley v. Luce*, 99 Ill. 234; *Willcox v. Jackson*, 51 Iowa, 208; *Wampler v. Wampler*, 30 Grat. 454; *Walker v. Day*, 8 Baxt. 77; *Foster v. Gassett*, 29 Ala. 393; *Cooper v. McIlwain*, 58 Ala. 296; *Nelson v. Wood*, 62 Ala. 175; *Lindsey v. Veasy*, 62 Ala. 421; *Henrioid v. Neusbaumer*, 69 Mo. 96; *Poston v. Balch*, 69 Mo. 115; *Pendarvis v. Gray*, 41 Tex. 326; *West v. Waddill*, 33 Ark. 575; *Myton v. Thurlow*, 23 Kan. 212; see *McShane v. Hazlehurst*, 50 Md. 107. As to rescission for non-performance, see *infra*, § 919; *McLean v. Richardson*, 127 Mass. 339.



lusion with the other side, may be rescinded on proof of these facts;<sup>1</sup> and so where a mother, over sixty years of age, was induced by her son to convey to a third person, who afterwards conveyed to the son, a ranch on an insufficient consideration;<sup>2</sup> and so where a woman living a hundred miles from the place where she could obtain information as to the facts, was induced by her attorney, who was also the executor of a will under which she was entitled to a legacy of \$4000, to sell that interest at a great sacrifice, it being represented to her falsely that her interest was likely to be lost;<sup>3</sup> and so of an agreement between stockholders in a corporation to hold their stock in a common interest, which agreement the defendant was induced to make by a fraudulent suppression of facts by the plaintiff.<sup>4</sup> A vendor's false representations, also, that the property sold was free from incumbrance with a specific exception, was held to sustain a rescission of the contract when it appeared that there were other incumbrances to a large amount which materially reduced the value of the property.<sup>5</sup> But when the representations complained of as false can be made good by the party seeking specific performance, then, there being no wrong done, specific performance will be decreed whenever the representations in question are made good by the complainant.<sup>6</sup> But the actual defect, in such case, must be made good; and when the falsity consists in a deficiency in the land to be conveyed, this cannot be cured by the offer of other land to the same extent elsewhere.<sup>7</sup> On the other hand, a party injured may hold on to the contract and sue for damages caused by the deceit.<sup>8</sup>—A buyer may refuse,

may claim damage, and so when other party is unable to perform.

<sup>1</sup> *Young v. Hughes*, 32 N. J. Eq. 372.

<sup>2</sup> *Dalton v. Dalton*, 14 Nev. 419; see *Biglow v. Leabo*, 8 Oregon, 147; see *supra*, § 159.

<sup>3</sup> *Reed v. Peterson*, 91 Ill. 288.

<sup>4</sup> *Havemeyer v. Havemeyer*, N. Y. Ct. of App. 1881, noticed *supra*, § 251; *Hichens v. Congreve*, 4 Russ. 562; *Blake's case*, 34 Beav. 639; *Foss v. Harbottle*, 2 Hare, 461; *Rawlins v.*

*Wickham*, 3 De G. & J. 304; *Conkey v. Bond*, 36 N. Y. 428; *Getty v. Devlin*, 54 id. 403; *Getty v. Donelly*, 9 Hun, 603; *Place v. Minster*, 65 N. Y. 102.

<sup>5</sup> *Kenney v. Hoffman*, 31 Grat. 442; see *supra*, §§ 259–60.

<sup>6</sup> *Pulsford v. Richards*, 17 Beav. 95; see *infra*, § 285.

<sup>7</sup> *Yost v. Shaffer*, 3 Ind. 331.

<sup>8</sup> *Wald's Pollock*, 507; *Bridge v. Batchelder*, 9 Allen, 394; *Simons v.*

if there be a breach of warranty express or implied, or other ground of rescission, to retain the goods purchased, and on returning them may recover back the price paid. And whenever the vendor is unable to perform a substantial part of the contract, the purchaser may thus rescind. The remedy is not conditioned on fraud.<sup>1</sup>—The same rule applies to purchases of real estate. Thus, to adopt illustrations given by Mr. Pollock,<sup>2</sup> “if the owner of an estate sells it as unincumbered, concealing from the purchaser the existence of incumbrances, the purchaser may, if he thinks fit, call on him to perform his contract and redeem the incumbrances.”<sup>3</sup> If, also, promoters of a partnership undertaking induce persons to take part in it by untruly representing that a certain amount of capital has been already subscribed for, they will themselves be put on the list of contributories for that amount.”<sup>4</sup>—Rescission may be exercised as much by or against the personal representa-

Oil Co., 61 Penn. St. 202; McElhenny's App., 61 Penn. St. 188; Rice's App., 79 Penn. St. 168; Armstead v. Hundley, 7 Grat. 52; Allin v. Millison, 72 Ill. 201; Thomas v. Coultas, 76 Ill. 493; see Schilling v. Short, 15 W. Va. 780.

<sup>1</sup> *Supra*, § 214; Benj. on Sales, 3d Am. ed. 436; Udell v. Atherton, 7 H. & N. 181; Clarke v. Dickson, E. B. & E. 148; Street v. Blay, 2 B. & Ad. 456; Soper v. Stevens, 14 Me. 133; Farris v. Ware, 60 Me. 482; Manahan v. Noyes, 52 N. H. 232; Poor v. Woodburn, 25 Vt. 234; Downer v. Smith, 32 Vt. 1; Gates v. Bliss, 43 Vt. 299; Perkins v. Bailey, 99 Mass. 61; Kinney v. Kierman, 2 Lans. 492; Stickter v. Guldin, 30 Penn. St. 114; Hartje v. Collins, 46 Penn. St. 268; Short v. Stevenson, 63 Penn. St. 95; Hoopes v. Strasburger, 37 Md. 390; Pierce v. Wilson, 34 Ala. 596; Foster v. Gressett, 29 Ala. 393; Blen v. Bear River Co., 20 Cal. 602; see notes to Chandelor v. Lopus, 1 Smith, L. C. 7th Am. ed. 299. That rescission may be on defective per-

formance, see Miller v. Phillips, 31 Penn. St. 218; North Am. Oil Co. v. Forsyth, 48 Penn. St. 291; Forsyth v. Oil Co., 53 Penn. St. 168. That where there is a warranty the warranty should be looked to if redress is sought on the ground of the falsity of the warranty, see *supra*, § 214; Freyman v. Knecht, 78 Penn. St. 141. That on a failure of part performance there may be rescission, see *infra*, §§ 293, 580. That performance must be in the mode stipulated in contract, and that if this be not done, there may be rescission, see *infra*,\* §§ 869 *et seq.* But mere insolvency without fraud will not be ground for rescission; *supra*, §§ 258, 262; Smith v. Smith, 21 Penn. St. 367; Rodman v. Thalheimer, 75 Penn. St. 232.

<sup>2</sup> Wald's Pollock, 507.

<sup>3</sup> Romilly, M. R., in Pulsford v. Richards, 17 Beav. 96; *cf.* Ungley v. Ungley, L. R. 5 Ch. D. 887.

<sup>4</sup> Moore & De la Torre's case, L. R. 18 Eq. 661.

tives of the contracting parties as by or against the contracting parties themselves.<sup>1</sup>—A party, also, who is sued for purchase money on a purchase he alleges to have been defrauded in making, may elect to affirm the sale, and may set off his damages in abatement of the price.<sup>2</sup>—To sustain a decree of a court of equity rescinding a contract, the proof should be strong and plain. The case is in this respect to be distinguished from a suit for a specific performance. Proof that would preclude a decree for the plaintiff in a suit for specific performance will not necessarily be sufficient to sustain a decree for the plaintiff in a suit for rescission. The burden is on the plaintiff in the latter case to make out a case of fraud or material mistake, and this case must be satisfactorily proved.<sup>3</sup>—As we have already seen,<sup>4</sup> a contract induced by honest misrepresentations may be rescinded, though no action would lie for deceit.

§ 283. A contract induced by fraud is voidable, not void, it being within the option of the party defrauded to confirm or repudiate. By the Roman law, as we have seen, a party defrauded in a contract has the option of holding on to the contract, with special compensation for its defective consummation caused by the fraud of the other side, or of rescinding the contract, and recovering damages for his entire loss in the whole trans-

Contract induced by fraud is voidable.

<sup>1</sup> *Load v. Green*, 15 M. & W. 216; *Donaldson v. Farwell*, 93 U. S. 601.

<sup>2</sup> *Supra*, § 232 a; *Hill v. Buckley*, 17 Ves. 394; *Kelly v. Pember*, 35 Vt. 183; *Lord v. Brookfield*, 8 Vroom, 552; *Brewster v. Brewster*, 9 Vroom, 119; *Cravens v. Kiser*, 4 Ind. 512; *Cox v. Reynolds*, 7 Ind. 257; *Earl v. Bryan*, Phill. Eq. (N. C.) 278; *Cullum v. Bank*, 4 Ala. 21. The remedies given by equity, under form of decrees for rescission and decrees of specific performance, are substantially the same as those given in the Roman law by the *restitutio in integrum*; 1 Spence, Eq. 622; *Bispham Eq.* § 198. That on re-

scission, the consideration paid may be recovered back, see *infra*, §§ 520, 742.

<sup>3</sup> *Edmunds' Appeal*, 59 Penn. St. 220; *Stewart's Appeal*, 78 Penn. St. 88; *Cummins v. Hurlbutt*, 92 Penn. St. 165; *Lynch's App.*, 97 Penn. St. 349; *Scott v. Webster*, 50 Wis. 53; *Lavassar v. Washburne*, 50 Wis. 200; *Fitz v. Bynum*, 55 Cal. 459; see *Smith v. Richards*, 13 Pet. 26, where it was held immaterial whether the misrepresentation proceeded from mistake or fraud; *supra*, § 214. That preponderance of proof is sufficient, see *supra*, § 239.

<sup>4</sup> *Supra*, §§ 214, 241.

action.<sup>1</sup> And such is the rule in our own law.<sup>2</sup> It was at one time argued in Pennsylvania that a contract induced by fraud is absolutely void, and hence not susceptible of confirma-

<sup>1</sup> L. 62, § 1, D. de contrah. emt. xviii., 1—Voet, *Com. L.* iv. T. 3, § 7.

Savigny's views in cases where a bargain has been made under influence of error have been already stated. *Supra*, § 177. The alternatives, so far as concerns the question now immediately before us, he states as follows: The transaction might be regarded as *prima facie* valid, the party in error to be entitled to impeach it by legal process; or the transaction, on account of want of consent, is a nullity. By the Roman law this is the case when fraud precludes assent. Numerous rulings are cited to this effect, among which may be noticed L. 9, § 2, de contr. emt. (18, 1): . . . "in ceteris autem nullam esse venditionem puto, quotiens in materia erratur." In L. 11, pr. eod., the existence of a *consensus* in such cases is negatived. It is the error as to the nature of the thing that requires us to conclude that the will requisite to a contract was wanting. This, however, may be complicated by the introduction of other conditions. There may, for instance, so Savigny goes on to say, be an express warranty of some subordinate quality, so that the party giving the warranty may be sued either on the promise or for fraud.

The only cases, so Savigny holds, in which errors of this class are held so essential as to avoid all contracts based on them, are cases in which a purchaser is in error as to the *genus* (Gattung) of purchased goods, as where he buys a vessel of brass or lead for a vessel of gold or silver, or where he buys vinegar for wine. The result in such cases is the same whether the vendor was or was not participant in the purchaser's error. The main effect

of this principle is to protect the purchaser from paying a preposterously high price for an inferior article. There are, however, other consequences. If the bargain should be for a golden vessel, and the price be suitable for such a vessel, then the purchaser might wish to treat the contract as binding, and to claim the difference of price *ex contractu*; but this he cannot do, since there was no contract, even in cases where the vendor was *in dolo*. But fraud in such cases has independent consequences. The vendor would be liable in an action of deceit, and would be required to pay damages to indemnify the purchaser for his loss, even though the contract itself was a nullity. The vendor is obliged to put the purchaser in the position he would have been in had there been no such transaction.

The nullity of sales of this class was not recognized in the earlier stages of Roman jurisprudence; it is one of the conclusions, according to Savigny, of that jurisprudence in its more perfect development. By Ulpian and Paulus the doctrine, after much wavering by older jurists, was firmly asserted. L. 9, 11, 14, de contr. emt. (18, 1). See discussion, *supra*, § 177.

<sup>2</sup> *Oakes v. Turquant*, L. R. 2 H. L. 346; *Clough v. R. R.*, L. R. 7 Ex. 26; *Foreman v. Bigelow*, 4 Cliff. C. C. 508; *Cooper v. Newman*, 45 N. H. 339; *Lindsley v. Ferguson*, 49 N. Y. 625; and cases cited in the following sections. That a party misled by honest misrepresentations may rescind, see *supra*, § 214. As to the distinction between voidable and void contracts, see *supra*, § 28.

tion,<sup>1</sup> though it is otherwise, so it is declared, when the fraud does not consist in a false pretence as to an individual, but in what is called constructive fraud, as where a trustee buys the *cestui que trust's* property, while in cases of constructive fraud the transaction, being merely voidable, may be confirmed.<sup>2</sup> But this exception no longer is maintained in Pennsylvania,<sup>3</sup> and cannot on principle be supported. If adopted it would paralyze business. Few statements made during negotiations are absolutely exact; there are few negotiations in which each party does not seek to make a good bargain, and does not use language in which a severe critic might not discover at least omissions of facts the statement of which might have caused hesitancy on the other side. If all sales in which false pretences of any kind have been used are so void as to be incapable of subsequent confirmation, it is hard to see what titles would be secure. Fraud is easily charged, and depends, as a matter of fact, upon the opinion of a jury based upon the case that may happen to be presented at trial. To say that all sales in which fraud enters are void would expose the title, not only of the fraudulent vendee, but of persons *bona fide* purchasing from him, to destruction upon contingencies which no prudence could forecast or ward against.<sup>4</sup> At the same time it must be remembered that the distinction above noticed holds so far good that, in cases of false personation, no title passes, and, therefore, the transaction is inoperative as to third parties,<sup>5</sup> while in cases of

<sup>1</sup> Chess v. Chess, 1 Pen. & Watts, 32; Jackson v. Summerville, 13 Penn. St. 359; McCaskey v. Graff, 23 Penn. St. 321; McHugh v. Schuylkill Co., 67 Penn. St. 391; Seylor v. Carson, 69 Penn. St. 81; see *infra*, § 288.

<sup>2</sup> Pearsoll v. Chapin, 44 Penn. St. 9; Negley v. Lindsay, 67 Penn. St. 217. See as tending to same effect, Foster v. Mackinnon, L. R. 4 C. P. 704; Hunter v. Walters, L. R. 7 Ch. Ap. 75; Stacy v. Ross, 27 Tex. 3.

<sup>3</sup> Shisler v. Vandike, 92 Penn. St. 447, cited *infra*, § 288.

<sup>4</sup> See Bigelow on Fraud, 421; Myton

v. Thurlow, 23 Kan. 30. In Moorhouse v. Woolfe, 46 L. T. N. S. 374, it was held that where a party acting as money-lender offers by public advertisement to lend on easy terms, and then exacts from a borrower peculiarly hard terms, the burden will be on the lender to prove that the terms of the loan were made fully known to the borrower.

<sup>5</sup> *Supra*, § 183; *infra*, § 291; Cundy v. Lindsay, L. R. 3 Ap. Ca. 465; Hardman v. Booth, 1 H. & C. 803; Hollins v. Fowler, L. R. 7 H. L. 757; Moody v. Blake, 117 Mass. 23; Barker v. Dins-

fraud by false pretences a title to the goods obtained passes, though the party obtaining the goods is exposed to a prosecution for false pretences, and to an action of deceit, as well as to a rescission of the contract.<sup>1</sup> This distinction, however, only applies to title. So far as involves the relations of the parties concerned in the bargain, the mere fact that the contract may be subsequently rescinded does not prevent its intermediate efficiency.<sup>2</sup>

§ 284. A party who claims to be defrauded in a contract must exercise his election to rescind within a reasonable time. By letting his claims lie dormant after he has notice of the fraud, he may be estopped from contesting the contract, so far, at least, as *bona fide* third parties are concerned, or when the other party has been misled by this supine acquiescence.<sup>3</sup> For a party imposed upon to delay unnecessarily his repudiation of the contract by which he was defrauded is evidence from which a ratification may be inferred;<sup>4</sup> though mere length of time does not by itself give ground for this inference, without proof of supine acquiescence.<sup>5</sup> There must have been knowledge of the fraud to make lapse of time by itself a bar.<sup>6</sup> And knowl-

Election  
must be in  
reasonable  
time.

more, 72 Penn. St. 427; cited Wald's Pollock, 409; and see other cases cited *supra*, § 183; *infra*, § 291.

<sup>1</sup> *Supra*, §§ 183 *et seq.* As to distinction between void and voidable, see further *supra*, § 28; *infra*, § 291.

<sup>2</sup> *Infra*, § 288.

<sup>3</sup> *Infra*, § 289; Central R. R. v. Kish, L. R. 2 H. L. 99; Heymann v. R. R., L. R. 7 Eq. 154; Bwlch-y-Plwm Lead Co. v. Baynes, L. R. 2 Ex. 326; Clough v. R. R., L. R. 7 Ex. 34; Morrison v. Ins. Co., L. R. 8 Ex. 203; Upton v. Trebilcock, 91 U. S. 45; Pence v. Langdon, 99 U. S. 578; Weeks v. Robie, 42 N. H. 316; Manahan v. Noyes, 52 N. H. 232; Matteson v. Holt, 45 Vt. 336; Whitcomb v. Denio, 52 Vt. 382; Bassett v. Brown, 105 Mass. 551; Degraw v. Elmore, 50 N. Y. 1; Hammond v. Pennock, 61 N. Y. 145; Wil-

liamson v. R. R., 29 N. J. Eq. 311; Kollock v. Knowlton, 1 Weekly Notes, 514; Leaming v. Wise, 73 Penn. St. 173; Morgan v. McKee, 77 Penn. St. 228; Hunt v. Stuart, 53 Md. 225; Heald v. Wright, 75 Ill. 17; Gatling v. Newell, 9 Ind. 572; Watson Coal Co. v. Casteel, 68 Ind. 476; Hall v. Fullerton, 69 Ill. 448; Barfield v. Price, 40 Cal. 535; Memphis, etc. R. R. v. Neighbors, 51 Miss. 412; Crutchfield v. Stanfield, Sup. Ct. Tex. 1881; see *infra*, § 752.

<sup>4</sup> Bright v. Legerton, 2 D. F. J. 606.

<sup>5</sup> Charter v. Trevelyan, 11 Cl. & F. 714.

<sup>6</sup> *Infra*, § 289; Lindsay Petrol. Co. v. Hurd, L. R. 5 P. C. 221; Wright v. Vanderplank, 8 D. M. G. 133; Campbell v. Fleuning, 1 Ad. & El. 40; Veazie v. Williams, 8 How. 134;

edge of facts of which the party was bound to take notice will be inferred.<sup>1</sup> But "acquiescence and waiver are always questions of fact. There can be neither without knowledge." Nor can the wrong done in such cases exact perfect vigilance on the part of the other contracting party. Ordinary business sagacity is all that is required.<sup>2</sup> The question of reasonable time is one of mixed law and fact.<sup>3</sup>

§ 285. A party seeking to rescind must, as an ordinary prerequisite to recover, offer to return before trial what-  
 ever he may have obtained from the contract he thus  
 applies to repudiate;<sup>4</sup> and in cases of conveyance of  
 land, must tender a reconveyance.<sup>5</sup> The party from whom  
 the relief is claimed must be put, as far as is possible, in the  
 position he was in before the transaction complained of.<sup>6</sup>

Party re-  
 scinding  
 must do  
 equity.

*Grymes v. Sanders*, 93 U. S. 55; *Matteson v. Holt*, 45 Vt. 336; *Boughton v. Standish*, 48 Vt. 594; *Baker v. Lever*, 67 N. Y. 304.

<sup>1</sup> *Upton v. Trebilcock*, 91 U. S. 45; *Whitney v. Allaire*, 4 Denio, 554; *Baker v. Lever*, 67 N. Y. 304.

<sup>2</sup> *Pence v. Langdon*, 99 U. S. 581; see *infra*, § 289; and see *De Bussche v. Alt*, L. R. 8 Ch. D. 314.

<sup>3</sup> *Rothschild v. Rowe*, 44 Vt. 389; *Pratt v. Farrar*, 10 Allen, 519; *Williams v. Powell*, 101 Mass. 467; *Hedges v. R. R.*, 49 N. Y. 223; *Morgan v. McKee*, 77 Penn. St. 228. "What is a reasonable time or undue delay, when the facts are not disputed, is a question of law to be determined by the court. *Morgan v. McKee*, 77 Penn. St. 228. When the facts are in dispute, the question necessarily goes to the jury, and if a party wishes specific instructions respecting reasonable time or undue delay, he may secure them by putting proper points." *Trunkey, J.*, in *Davis v. Stuard*, Sup. Ct. Penn. 1882, 11 Weekly Notes, 367.

<sup>4</sup> *Infra*, § 919; *Bwlch-y-Plwm Lead Co. v. Baynes*, L. R. 2 Ex. 324; *Clough v. R. R.*, L. R. 7 Ex. 26; *Gay v. Alter*,

102 U. S. 79; *Cushman v. Marshall*, 21 Me. 122; *Emerson v. McNamara*, 41 Me. 565; *Cook v. Gilman*, 34 N. H. 556; *Poor v. Woodburn*, 25 Vt. 234; *Coolidge v. Brigham*, 1 Met. 547; *Estabrook v. Swett*, 116 Mass. 303; *Burton v. Stewart*, 3 Wend. 236; *Cobb v. Hatfield*, 46 N. Y. 533; *Parkinson v. Sherman*, 74 N. Y. 72; *Turnpike Co. v. Com.*, 2 Watts, 433; *Roth v. Crissy*, 30 Penn. St. 145; *Babcock v. Case*, 61 Penn. St. 427; *Beetem v. Burkholder*, 69 Penn. St. 249; *Morrow v. Rees*, 69 Penn. St. 368; *Jennings v. Gage*, 13 Ill. 610; *Williams v. Ketchum*, 21 Wis. 432.

<sup>5</sup> *Kimball v. Cunningham*, 4 Mass. 502; *Nicholson v. Halsey*, 1 John. Ch. 417; *Pearsoll v. Chapin*, 44 Penn. St. 9; *Wilbur v. Flood*, 16 Mich. 40; *Parks v. Evansville R. R.*, 23 Ind. 567; *Blaney v. Hanks*, 14 Iowa, 400; *Mitchell v. Moore*, 24 Iowa, 394.

<sup>6</sup> *Bigelow on Fraud*, ch. xi. § 5; *Bellamy v. Sabine*, 2 Phill. 425; *Savery v. King*, 5 H. L. C. 627; *Neblett v. Macfarland*, 92 U. S. 101; *Ayers v. Hewett*, 19 Me. 281; *Farris v. Ware*, 60 Me. 482; *Potter v. Titcomb*, 22 Me. 300; *Sumner v. Parker*, 36 N. H. 449; *Willoughby v. Moulton*, 47 N. H. 205;

This, however, does not mean that things should be replaced in every sense as they were, as this is impossible, but that the injured party should restore whatever he has received that he can restore, and surrender any advantages he may have received.<sup>1</sup> That absolute restitution is impossible, is no bar when fraud is shown;<sup>2</sup> but a tender of performance is not necessary in cases where the defendant has admitted his inability to perform.<sup>3</sup> Nor is a tender of reconveyance necessary when there is no interest to reconvey,<sup>4</sup> or when the thing in question is worthless.<sup>5</sup> In any view, however, possession of a thing bought, when such thing is of value, must be surrendered or

Rowley v. Bigelow, 12 Pick. 307; Perley v. Balch, 23 Pick. 283; Thayer v. Turner, 8 Met. 550; Dailey v. Green, 15 Penn. St. 118; Buffington v. Quantin, 17 Penn. St. 310; Renshaw v. Lefferman, 51 Md. 277; Smith v. Brittenham, 98 Ill. 188; Gatling v. Newell, 9 Ind. 572; Hyslip v. French, 52 Wis. 513; Johnson v. Jones, 13 Sm. & M. 580; Pilcher v. Smith, 2 Head, 208; First Nat. Bank v. Yocum, 11 Neb. 328. That the identical currency received need not be tendered, see Michigan, etc. R. R. v. Dunham, 30 Mich. 128. That a party seeking to recover back consideration paid on forged instrument, must offer to return it to defendant before suit brought, see Roth v. Crissy, 30 Penn. St. 145. And so where the object is to rescind a purchase of stocks alleged to be fraudulent, unless the stocks are absolutely worthless, which is a question for the jury. Babcock v. Case, 61 Penn. St. 427; Beetem v. Burkholder, 69 Penn. St. 249; Morrow v. Rees, 69 Penn. St. 368.

<sup>1</sup> Downer v. Smith, 32 Vt. 1; Martin v. Roberts, 5 Cush. 126; Masson v. Bovet, 1 Denio, 69; Gatling v. Newall, 9 Ind. 572.

<sup>2</sup> Ibid; Myrick v. Jack, 33 Ark. 425.

<sup>3</sup> Kerst v. Ginder, 1 Pitts. 314; Cross-

grove v. Himmelrich, 54 Penn. St. 203. See *supra*, §§ 312, 603, 716-747. It is otherwise when there is no such admission as shows the performance of the contract on the defendant's part is impossible. Irvin v. Bleekley, 67 Penn. St. 24. See *infra*, § 605.

<sup>4</sup> Bates v. Graves, 2 Ves. Jr. 287; Perley v. Balch, 23 Pick. 283; McCabe v. Burns, 66 Penn. St. 356; 77 Penn. St. 309. That rescission of a written contract may be by parol, see Laner v. Lee, 42 Penn. St. 165; though it is otherwise as to a written contract for sale of land, followed by entry and improvement. Cravender v. Bowser, 4 Barr, 259. *Infra*, §§ 325, 661, 995.

<sup>5</sup> Thurston v. Blanchard, 22 Pick. 18; Duval v. Mowry, 6 R. I. 479; Frost v. Lowry, 15 Ohio, 200; but see Cook v. Gilman, 34 N. H. 556. If the thing, however, can be made use of as an advantage in any way, or if its loss would be a disadvantage to the party by whom it was sold, tender should be made. Morse v. Brackett, 98 Mass. 205; 104 Mass. 494; Bassett v. Brown, 105 Mass. 551. That tender is not necessary in an action for deceit, see Clarke v. Dickson, E. B. & E. 148; Western Bank of Scotland v. Addie, L. R. 1 Sc. & D. 169; Bacon v. Brown, 4 Bibb, 91.



the thing tendered back before a rescission of the contract of purchase can be attempted.<sup>1</sup> But when a tender is impossible, and the transaction is imputable to the defendant's fraud, the tender will not be insisted on as a condition precedent.<sup>2</sup> Nor is a party defrauded compelled to keep perishable property in good condition as a prerequisite to a bill for rescission.<sup>3</sup> A tender of purchase money, also, is not requisite when, in the transaction complained of as fraudulent, the party charged with the fraud received from the complainant a sum as great as the purchase money.<sup>4</sup>—A tender at trial is sufficient in all cases where the form of suit does not require the tender to be previously made.<sup>5</sup> And in other cases, a party who, by his misconduct, prevents a tender from being made before trial, cannot object that it has been delayed until the trial opens.<sup>6</sup> As a general rule, also, no tender is necessary when the judgment asked for involves a restoration to the defendant of all that he had received.<sup>7</sup>—A party who can secure the full per-

<sup>1</sup> *Vigers v. Pike*, 8 Cl. & F. 562; *Norton v. Young*, 3 Greenl. 30; *Cushing v. Wyman*, 38 Me. 589; *Miner v. Bradley*, 22 Pick. 457; *Perley v. Balch*, 23 Pick. 286; *Ladd v. Moore*, 3 Sandf. 589; *Gould v. Bank*, 21 Hun, 293; *Smith v. Webster*, 2 Watts, 478; *Jackson v. McGinnis*, 14 Penn. St. 331; *Stewart v. Keith*, 12 Penn. St. 238; *Haase v. Mitchell*, 58 Ind. 213; *Warren v. Tyler*, 81 Ill. 15. As to tender see *infra*, § 987.

<sup>2</sup> *Smith v. Smith*, 30 Vt. 139; *Chandler v. Simmons*, 97 Mass. 508; *Bartlett v. Drake*, 100 Mass. 174; *Masson v. Bovet*, 1 Denio, 69. *Infra*, §§ 661-995.

<sup>3</sup> *Nebblett v. Macfarland*, 92 U. S. 101.

<sup>4</sup> *Montgomery v. Pickering*, 116 Mass. 227. See *infra*, § 989.

<sup>5</sup> *Infra*, §§ 998 *et seq.*; *Kiefer v. Rogers*, 19 Minn. 32; *Martin v. Martin*, 35 Ala. 560.

<sup>6</sup> *Southworth v. Smith*, 7 Cush. 391; *Smith v. Holyoke*, 112 Mass. 517; *Hammond v. Pennock*, 61 N. Y. 145; *Baney v. Killmer*, 1 Barr, 30; *Frost*

*v. Lowry*, 15 Ohio, 200; *Martindale v. Harris*, 26 Oh. St. 379. *Infra*, §§ 312, 603, 716, 995.

<sup>7</sup> *Allerton v. Allerton*, 50 N. Y. 670; *Harris v. Ins. Co.*, 64 N. Y. 196. See generally as to tender §§ 970 *et seq.* It has been said by courts of high authority that when there has been actual fraud on the purchaser's part, the vendor is not required to tender the money received by him as a prerequisite to suit for rescission. *Weeden v. Hawes*, 10 Conn. 50; *Sands v. Codwise*, 4 Johns. 536; *McCaskey v. Graff*, 23 Penn. St. 321; *Saylor v. Carson*, 69 Penn. St. 81; *Forniquet v. Forstall*, 34 Miss. 87. This, however, is based on the assumption that a sale induced by fraud is absolutely void, which, as is elsewhere argued, cannot be accepted as a general rule. *Supra*, §§ 28, 283; *infra*, §§ 291 *et seq.* And it is hard to see how a party can claim relief from fraud committed on him when he seeks to retain the profits which the fraud put in his hands. See *Bigelow on Fraud*, 423.

formance of a contested contract on his own part, cannot, after a partial performance, demand a rescission and return of what he has already paid.<sup>1</sup>—The vendee of stock in a corporation, who rescinds on the ground of fraud his contract of purchase, is not bound to tender the stock left on deposit for him by the vendor before bringing an action to recover the purchase money.<sup>2</sup>—Where one of the parties elects to rescind, the other party can recover back the money paid on account.<sup>3</sup>

§ 286. A party cannot compel rescission if he has kept his intention in this respect quiet until the other party has done or left undone things on the basis of the contract which would expose him to irreparable loss if the contract is rescinded.<sup>4</sup> Thus an insurance policy may be voidable on the ground of fraudulent concealment by the insured; but the insurer who knows of this concealment, and apparently acquiesces in it, cannot, when the insured would thereby lose the opportunity of insurance, rescind it.<sup>5</sup> “Or the interest taken under the contract by the party misled may have been so dealt with (with his assent) that he cannot give back the same thing he received. On this principle, a shareholder cannot repudiate his shares if the character and constitution of the company have in the mean time been altered.”<sup>6</sup> In such cases it has been held too late to repudiate the shares, the only remedy being an action of deceit against the directors personally for the false statements.<sup>7</sup> And a party who makes restitution impossible cannot compel restitution,<sup>8</sup> though it is otherwise when such restitution is made impossible by the party to whom the original

Rescission  
not granted  
when by  
complain-  
ant's laches  
other par-  
ties would  
be exposed  
to loss.

<sup>1</sup> *Pierce v. Jarnagin*, 57 Miss. 107.

<sup>2</sup> *Pence v. Langdon*, 99 U. S. 578.

<sup>3</sup> *Infra*, §§ 520, 746; *Hudson v. Reel*, 5 Barr, 279; *Feay v. De Camp*, 15 S. & R. 227.

<sup>4</sup> *Clough v. R. R.*, L. R. 7 Ex. 26; *Baker v. Lever*, 67 N. Y. 304; *Bond v. Ramsey*, 89 Ill. 29; *Bulkley v. Morgan*, 46 Conn. 393; *Mecke v. Ins. Co.*, 8 Phila. 6; see *Knight v. Houghtalling*, 85 N. C. 17.

<sup>5</sup> *Morrison v. Ins. Co.*, L. R. 8 Ex. 206.

<sup>6</sup> *Pollock* (Wald's ed.) 511, citing *Clarke v. Dickson*, E. B. & E. 148.

<sup>7</sup> *Ibid.*; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *West. Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145.

<sup>8</sup> *Vigers v. Pike*, 8 Cl. & F. 562; *Nickel Co. v. Unwin*, L. R. 2 Q. B. D. 214; *McCrillis v. Carlton*, 37 Vt. 139; *infra*, §§ 312, 603-4, 661, 716, 747, 901.

fraud is imputable.<sup>1</sup> The same rule is adopted in the Roman law in respect to the *restitutio in integrum*, and is affirmed in the Scotch law. "It can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. This is necessarily to be inferred from the expression *restitutio in integrum*; and the same doctrine is well understood and constantly acted on in England."<sup>2</sup> But the mere possession of property taken under a contract of sale does not preclude the purchaser from contesting the sale on ground of fraud. In decreeing rescission, the court can give compensation by an account of rents and profits.<sup>3</sup> "So long as he has made no election, he retains the right to determine it either way; subject to this, that if in the interval, whilst he is so deliberating, an innocent third party has acquired an interest, or if in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind; and lapse of time without rescinding will furnish evidence that he has determined to affirm the contract."<sup>4</sup> A party, also, implicated in a fraud, cannot obtain relief from a contract the fraud induced,<sup>5</sup> unless he was a dupe or victim of the fraud.<sup>6</sup>

§ 287. A party who seeks to rescind on ground of fraud must give notice within reasonable time of his intention.<sup>7</sup> If he resist the contract on this ground, and if he set up the fraud as a defence, this, if it goes to the whole case, is a sufficient disavowal to amount to a notice of rescission.<sup>8</sup> A suit to annul the contract on account of fraud is a sufficient rescission,<sup>9</sup> and so is the plea

Party rescinding should give notice.

<sup>1</sup> Hammond v. Pennock, 61 N. Y. 145.

<sup>2</sup> Lord Cranworth, in Western Bk. of Scotland v. Addie, L. R. 1 Sc. & D. 164.

<sup>3</sup> Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 240; King v. King, 1 M. & K. 442; Met. R. R. Co. v. Defries, L. R. 2 Q. B. D. 189.

<sup>4</sup> Per cur. in Clough v. R. R., L. R. 7 Ex. 35; adopted by the court in Morrison v. Ins. Co., L. R. 8 Ex. 204.

<sup>5</sup> Supra, § 235; infra, § 340.

<sup>6</sup> Infra, § 353.

<sup>7</sup> Herrin v. Libby, 36 Me. 350; Mas-son v. Bovet, 1 Denio, 69; Morrow v. Rees, 69 Penn. St. 368; Moral School v. Harrison, 74 Ind. 93.

<sup>8</sup> Clough v. R. R., L. R. 7 Ex. 36; see Dawes v. Harness, L. R. 10 C. P. 166.

<sup>9</sup> Reese River Co. v. Smith, L. R. 4 H. L. 73.

of fraud to a suit on the contract.<sup>1</sup> But the notice must not be ambiguous, and should imply a determination to contest the contract as invalidated by the fraud.<sup>2</sup> A sale to another party is notice, and the second purchaser will be protected against the first, when the first purchase was fraudulent.<sup>3</sup> As the plea of fraud imports an avoidance of the contract, it is necessary, to support it, to show some act of avoidance, as the return of the goods, or other circumstances showing the repudiation of the contract.<sup>4</sup> Hence, in an action by a company against a shareholder on calls, a plea alleging that he was induced by fraud to take shares is not sufficient; repudiation as far as possible should be alleged.<sup>5</sup>

§ 288. A contract impeachable for fraud may be ratified by the party injured, after a knowledge of the fraud, accepting of any benefit under it;<sup>6</sup> or by in any way acting upon it after such knowledge of the fraud;<sup>7</sup>

Ratification  
may be by  
conduct.

<sup>1</sup> *Clough v. R. R.*, L. R. 7 Ex. 35; *Morrison v. Ins. Co.*, L. R. 8 Ex. 205.

<sup>2</sup> *Ashley's case*, L. R. 9 Eq. 263; *McNiell's case*, L. R. 10 Eq. 503; see *Pawle's case*, L. R. 4 Ch. 497; *Maynard v. Eaton*, L. R. 9 Ch. 414. In Nevada a notice of rescission is not void because given on Sunday. *Pence v. Langdon*, 99 U. S. 598.

<sup>3</sup> *Whitney v. Roberts*, 22 Ill. 381. Where an engine was to be delivered at P. for the use of a particular railroad, and the engine was taken by the purchaser on trial, and found not to correspond to the warranty, it was held sufficient rescission of the contract to give notice of the non-acceptance of the engine to the vendor at P., that being his place of business, without sending back and tendering the engine there. *Starr v. Torrey*, 2 Zab. 190.

<sup>4</sup> *Deposit Ass. Co. v. Ayscough*, 6 E. & B. 761; *Bwlch-y-Plwm Mining Co. v. Baynes*, L. R. 2 Ex. 324; *Dawes v. Harness*, L. R. 10 C. P. 166.

<sup>5</sup> *Deposit Ass. Co. v. Ayscough*, 6 E. & B. 761.

<sup>6</sup> *Briggs ex parte*, L. R. 1 Eq. 483; *Blackburn v. Smith*, L. R. 2 Ex. 783; *Schooley v. R. R.*, L. R. 9 Eq. 266, *n.*; *Scholesfield v. Templer*, 4 De G. & J. 429; *Oakes v. Turquand*, L. R. 2 H. L. 346; *Selway v. Fogg*, 5 M. & W. 83; *Ogilvie v. Ins. Co.*, 22 How. 380; *Mason v. Bovet*, 1 Denio, 69; *Joselyn v. Cowee*, 52 N. Y. 90; *Seal v. Duffy*, 4 Barr, 274; *Mecke v. Ins. Co.*, 8 Philada. 6; *Filby v. Miller*, 25 Penn. St. 264; *Crane v. Kildorf*, 91 Ill. 567; *Jackson v. Jackson*, 47 Ga. 99; *Davis v. Evans*, 62 Ala. 401; *Evans v. Foreman*, 60 Mo. 449. That successors are barred by their predecessors' laches, see *Skottowe v. Williams*, 3 D. F. 4. 535. As to ratification in other cases see §§ 58 *et seq.*

<sup>7</sup> *Campbell v. Fleming*, 1 A. & E. 40; *Gray v. Fowler*, L. R. 8 Ex. 249; *Sharpley v. R. R.*, L. R. 2 Ch. D. 663; *Clough v. R. R.*, 7 Ex. 34; *Selway v. Fogg*, 5 M. & W. 83; *Blydenburgh v. Welsh*, *Baldw.* 331; *Northrop v. Bushnell*, 38 Conn. 498; *People v. Stephens*, 71 N. Y. 527; *Moffat v. Winslow*, 7 Paige, 124; *Mecke v. Ins. Co.*, 8 Phila.

or by laches which affect the position of others holding under the contested title;<sup>1</sup> or by bringing suit for the purchase money on a contract of sale, or in other way suing to enforce the contract;<sup>2</sup> or by making a compromise or other settlement as to the alleged imposition;<sup>3</sup> or by acting under a contract for work and labor after the imposition was known;<sup>4</sup> or, generally, by continuing freely to deal with the party defrauding after the fraud was discovered.<sup>5</sup> But the mere transient and temporary use of an article the plaintiff was fraudulently induced to take, does not preclude him from rescinding.<sup>6</sup>—In any view, a party is not estopped by an affirmation before discovery of the fraud.<sup>7</sup>—As has been already noticed,<sup>8</sup> it was at one time held in Pennsylvania that a fraudulent contract is not susceptible of ratification.<sup>9</sup> This, however, except as to frauds which involve a crime, is now overruled.<sup>10</sup> “Where the fraud is of such a character as to involve a crime, the ratification of the act from which it sprung is opposed to public policy, and, hence, cannot be permitted; but where the transaction is contrary only to good faith and fair dealing, where it affects individual interests and nothing else, ratification is allowable.”<sup>11</sup>

6; *Rogers v. Higgins*, 57 Ill. 244; *Knuckolls v. Lea*, 10 Humph. 577; *Thweatt v. McLeod*, 56 Ala. 375; *Bobb v. Woodward*, 50 Mo. 95.

<sup>1</sup> *Badger v. Badger*, 2 Wal. 87; *Wilmington v. Moulton*, 47 N. H. 208; *Weaver v. Carpenter*, 42 Iowa, 343.

<sup>2</sup> *Ferguson v. Carrington*, 9 B. & C. 59; *Gray v. Fowler*, L. R. 8 Ex. 249; *Dibblee v. Sheldon*, 10 Blatch. 178; *Bank of Beloit v. Beale*, 34 N. Y. 473; *Coleman v. Oil Co.*, 51 Penn. St. 77; *Reed v. McGrew*, 5 Ohio, 375; *Wald's Pollock*, 507.

<sup>3</sup> *Vigers v. Pike*, 8 Cl. & F. 562; *Hough v. Richardson*, 3 Story, R. 695.

<sup>4</sup> *Saratoga R. R. v. Row*, 24 Wend. 74.

<sup>6</sup> *Story's Eq. Jur.* 12th ed. § 203 a; *Vigers v. Pike*, 8 Cl. & F. 562; *Dingley*

*v. Robinson*, 5 Greenl. 127; *Duncan v. McCullough*, 4 S. & R. 483; *Adams v. Shelley*, 10 Ala. 478; *People v. Stephens*, 71 N. Y. 527.

<sup>5</sup> *Matteson v. Holt*, 45 Vt. 336; *Yeates v. Pryor*, 6 Eng. (Ark.) 58.

<sup>7</sup> *Doggett v. Emerson*, 3 Story, 740; *Pratt v. Phillbrook*, 41 Me. 132; *MacKinley v. McGregor*, 3 Whart. R. 369; *Pierce v. Wilson*, 34 Ala. 596; and cases cited in prior notes to this section.

<sup>8</sup> *Supra*, § 283.

<sup>9</sup> *McHugh v. Schuylkill*, 67 Penn. St. 391. As to distinction between “void” and “voidable” see *supra*, § 28.

<sup>10</sup> *Shisler v. Vandike*, 92 Penn. St. 447.

<sup>11</sup> *Ibid.* 449, *Gordon, J.*

§ 289 When fraud is successfully concealed, no length of time, no matter how great, will preclude relief to a party who has been thus kept in ignorance of the true state of facts.<sup>1</sup> Mere non-discovery of the facts, however, will not prevent the running of the statute "unless the relation of the parties is such that it was the duty of the party complained of to make the disclosure."<sup>2</sup> And where there is a discovery of the fraud, the disaffirmance should be prompt.<sup>3</sup> Reasonable time, however, will be allowed to a party, after discovery of a fraud, to assure himself of its reality.<sup>4</sup> "Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."<sup>5</sup> "But in every case, if an argument against relief which otherwise would be just is founded on mere delay, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."<sup>6</sup> Hence, where a shareholder applies to have his contract to take shares rescinded on account of fraud, while the application will be refused if dilatory,<sup>7</sup> "it is difficult to lay down any

<sup>1</sup> See *supra*, § 284; *infra*, §§ 603, 716, 747, 752; Wright's case, L. R. 7 Ch. 55; Charter v. Trevelyan, 11 Cl. & F. 714; Michoud v. Girod, 4 How. 561; Nealon v. Henry, 131 Mass. 153; Ralf v. Eberly, 23 Iowa, 467; Cock v. Van Etten, 12 Minn. 522.

<sup>2</sup> Bisph. Eq. § 203; Meader v. Norton, 11 Wal. 443; Veazie v. Williams, 3 Story R. 611; Hough v. Richardson, 3 Story R. 695; Callis v. Waddy, 2 Munf. 511; Humphreys v. Mattoon, 43 Iowa, 556; Wilson v. Ivey, 32 Miss. 233; see *infra*, § 752.

<sup>3</sup> *Ibid.*; Gates v. Bliss, 43 Vt. 299; Bulkley v. Morgan, 46 Conn. 393; Mas-

son v. Bovet, 1 Denio, 69; Fisher v. Wilson, 18 Ind. 133; Williams v. Ketchum, 21 Wis. 432; Moore v. Holt, 3 Ten. Ch. 248; Noble v. Noble, 26 Ark. 317.

<sup>4</sup> Partridge v. Usborne, 5 Russ. 195; Torrance v. Bolton, L. R. 8 Ch. App. 118; Doggett v. Emerson, 3 Story R. 740; Story on Cont. § 622.

<sup>5</sup> Per cur. in Clough v. R. R., L. R. 7 Ex. 35, adopted in Morrison v. Ins. Co., L. R. 8 Ex. 204.

<sup>6</sup> Lindsay Pet. Co. v. Hurd, L. R. 5 P. C. 240, adopted Leake, 2d ed. 393.

<sup>7</sup> Venezuela R. R. v. Kisch, L. R. 2 H. L. 99; Heyman v. R. R., L. R. 7 Eq. 154.

general rule as to the time within which objections of this character should be made the ground of repudiation of shares after they once have been discovered; in every case attention must be paid to circumstances."<sup>1</sup> In any view a party will not be permitted, after notice, to remain quiet and wait until the question of success is determined. "Although it is the undoubted duty of the court to relieve persons who have been deceived by false representations, it is equally the duty of the court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined others in speculations, to convert their speculations into certainties at the expense of those with whom they are joined."<sup>2</sup> Unless the circumstances be such as properly to lead to an inference of assent, acquiescence is not to be imputed.<sup>3</sup> What has been said with regard to rescission on ground of fraud applies to rescission on ground of non-performance of conditions precedent by the other side.<sup>4</sup>

§ 290. An election either to affirm or disaffirm a contract when once made is final. It is a question with which a party who claims to be defrauded cannot play fast and loose.<sup>5</sup> Hence it has been held that a party who sets up fraud in a sale of goods cannot, before the expiration of the credit on the sale, sue for the price of the goods; his remedy, if the sale be disaffirmed by him as fraudulent, is to repudiate the sale and to sue in trover.<sup>6</sup> Nor can a contract be ordinarily affirmed in part and disaffirmed in part.<sup>7</sup> But it is otherwise when a contract

Election is final and must be single.

<sup>1</sup> Cairns, L. C. *Ogilvie v. Currie*, 37 L. J. C. 541, quoted Leake, 2d ed. 394.

<sup>2</sup> Turner, L. J. in *Jenning v. Boughton*, 5 D. M. & G. 140, adopted Leake, 2d ed. 394.

<sup>3</sup> *DeBussche v. Alt*, L. R. 8 Ch. D. 314; see *Pence v. Langdon*, 99 U. S. 581.

<sup>4</sup> *Infra*, § 919.

<sup>5</sup> *Clough v. R. R.*, L. R. 7 Ex. 26; see Bigelow on Fraud, 425; *Ogilvie v. Currie*, 37 L. J. C. 541; *Selway v. Fogg*, 5 M. & W. 83.

<sup>6</sup> *Ferguson v. Carrington*, 9 B. & C. 59; *Wald's Pollock*, 507, citing *Dellone v. Hull*, 47 Md. 112, *Kellogg v. Turpie*, 2 Bradw. 55, concurring, and *Wigand v. Sichel*, 3 Keyes, 120, as diss.; *S. P. Potter v. Titcomb*, 22 Me. 300; *McCrillis v. Carlton*, 37 Vt. 139; *Evans v. Montgomery*, 50 Iowa, 325.

<sup>7</sup> *Kerr on F. and M.* 52; *Bisph. Eq.* § 204; *Great Luxembourg R. R. v. Magnay*, 25 Beav. 586; *Farmers' Bk. v. Groves*, 12 How. 51; *Potter v. Titcomb*, 22 Me. 300; *Miner v. Bradley*,

is divisible, in which case the fraudulent branch of the contract may be singly repudiated.<sup>1</sup> When, on the other hand, the contract consists of conditions reciprocally dependent, "it cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all, but the party complaining of the non-performance, or the fraud, must resort to an action for damages."<sup>2</sup>—A contract cannot be rescinded as to one party and remain effective as to the other.<sup>3</sup>—Affirmance merely precludes the right to rescind. A suit for damages for misrepresentation or fraud remains open.<sup>4</sup>

§ 291. Supposing a contract is so indivisible that if one part falls all the rest falls with it, then, if third parties without notice and for a good consideration innocently acquire rights under a voidable contract, this contract cannot be set aside by the party defrauded. Even assuming there was no negligence on his part, yet, between himself and innocent third parties, the loss should equitably fall on him in cases where his conduct led to the loss. This rule is applied in favor of a *bona fide* purchaser of a chattel from a party who has fraudulently obtained the property with the owner's consent.<sup>5</sup> "It

Rescission cannot be granted if rights of third parties intervene.

22 Pick. 457; *Filby v. Miller*, 25 Penn. St. 264; *Kellogg v. Turpie*, 93 Ill. 265. See, however, *contra*, *Roth v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 3 Keyes, 120.

<sup>1</sup> *Infra*, § 338; *Bellamy v. Sabine*, 2 Phillips, 425.

<sup>2</sup> Per cur. in *Nickel Co. v. Unwin*, L. R. 2 Q. B. D. 214; citing *Clarke v. Dickson*, 1 E. B. & E. 148; see *supra*, § 276; *infra*, § 919; *S. P. Junkins v. Simpson*, 14 Me. 364; *Voorhees v. Earl*, 2 Hill, N. Y. 292. And see *Brinley v. Tibbetts*, 7 Greenl. 70; *Barry v. Palmer*, 19 Me. 303; *Laurence v. Dale*, 3 Johns. Ch. 23; *Knight v. Houghtaling*, 85 N. C. 17.

<sup>3</sup> *Coolidge v. Brigham*, 1 Met. Mass. 550; *Bishop v. Stewart*, 13 Nev. 25; *supra*, § 32; *infra*, § 523.

<sup>4</sup> *Benj. on Sales*, § 452; *Herrin v. Libby*, 36 Me. 357; *Miller v. Barber*, 66 N. Y. 558; *Weimer v. Clement*, 37 Penn. St. 147; *Foulk v. Eckart*, 61 Ill. 318; *Peck v. Brewer*, 48 Ill. 55.

<sup>5</sup> *Supra*, § 211; *White v. Garden*, 10 C. B. 919; *Moyce v. Newington*, L. R. 4 Q. B. D. 32; *Stevenson v. Newnham*, 13 C. B. 285; *Load v. Green*, 15 M. & W. 216; *Ditson v. Randall*, 33 Me. 202; *Titcomb v. Wood*, 38 Me. 561; *Cooper v. Newman*, 45 N. H. 339; *Rowley v. Bigelow*, 12 Pick. 307; *Moody v. Blake*, 117 Mass. 23; *Dows v. Greene*, 32 Barb. 490; *Paddon v. Taylor*, 44 N. Y. 371; *Devoe v. Brandt*, 53 N. Y. 462; *Barnard v. Campbell*, 58 N. Y. 73; *Sinclair v. Healey*, 40 Penn. St. 417; *Hall v. Hinks*, 21 Md. 406; *Williams v. Given*, 6 Grat. 268; *Old Dom.*



is quite clear that when a vendee obtains possession of a chattel with the intention by the vendor to transfer *both the property and the possession*, although the vendor has committed a false and fraudulent misrepresentation in order to effect a contract or to obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that, if before the disaffirmance the fraudulent vendee has transferred over the whole or part of the chattel to an innocent transferee, the title of such transferee is good against the vendor.<sup>1</sup>—The reason is this: On the one side all property would be destroyed if a thief could pass title to stolen goods. On the other side all business would be destroyed if a *bona fide* purchaser of a chattel had imputed to him the false representations by which his vendor obtained the chattel. The difficulty is solved by the intermediate position above stated. A party who parts with property as well as possession cannot pursue goods into the hands of *bona fide* vendees.<sup>2</sup> But a party who receives property from a fraudulent vendee in payment of an antecedent debt takes it subject to the owner's rights;<sup>3</sup> and so, *a fortiori*, as to an assignee taking with notice of the fraud,<sup>4</sup> or taking without consideration.<sup>5</sup>—Even when goods fraudulently obtained are levied on as the property of the person fraudulently obtaining them, the owner is entitled to the goods in the

St. Co. v. Burekhardt, 31. Grat. 664; Dean v. Yates, 22 Oh. St. 388; Jennings v. Gage, 13 Ill. 610; Chicago Dock Co. v. Foster, 48 Ill. 507; Dickerson v. Evans, 84 Ill. 451; Hutchiman v. Watkins, 19 Iowa, 475; Gregory v. Schoenell, 55 Ind. 101; Kern v. Thurber, 57 Ga. 172; Nicol v. Crittenden, 55 Ga. 497; and other cases cited Benj. on Sales, 3d Am. ed. § 433.

<sup>1</sup> Per cur. in Kingsford v. Merry, 11 Ex. 577. Mr. Leake (2d ed. 398) cites further to this point, Pease v. Gloahac, L. R. 1 P. C. 219.

<sup>2</sup> In Kingsford v. Merry, 1 H. & N. 503, the ruling in 11 Ex. 577 was reversed on the ground that, while the

above rule was correct, it did not apply to the facts in evidence. In Oakes v. Turquand, L. R. 2 H. L. 325, Kent v. Freehold Land Co., L. R. 3 Ch. 493, the principle in the text was applied to sales of shares in companies as against shareholders in conflict with creditors after an order for winding up of the company.

<sup>3</sup> Leask v. Scott, L. R. 2 Q. B. D. 376; Stevens v. Brennan, 79 N. Y. 254; Shewmake v. Williams, 54 Ga. 206; see Barnard v. Campbell, 58 N. Y. 73.

<sup>4</sup> Crocker v. Crocker, 31 N. Y. 507.

<sup>5</sup> Ibid.

hands of the officer, notwithstanding the levy.<sup>1</sup> And, as a general rule, parties who are implicated in the fraud, or who take with notice of the fraud, acquire no rights beyond those of their fraudulent assignor.<sup>2</sup> Nor can the fraudulent vendee by selling to an innocent third party, and then buying back from him, obtain a good title against the true owner.<sup>3</sup> Nor do purchasers without consideration take any better title than their assignors.<sup>4</sup>

§ 292. A party, therefore, who takes no title to a chattel, cannot ordinarily (excepting in cases of market overt, which in this country does not exist),<sup>5</sup> or in cases where the owner is estopped by negligence, pass title to an assignee.<sup>6</sup> Thus A., who by falsely pretending to B. that he is sent by C. for goods bought by C. from B., obtains such goods from B., passes no title by selling such goods to D., though D. buys *bona fide*;<sup>7</sup> and the same rule has been held to apply to cases where A. obtains goods by false personation;<sup>8</sup> and by a bare fraud without any contract to transfer property, or any transfer of property.<sup>9</sup> Hence, where goods were obtained on the pretence of the party ob-

<sup>1</sup> *Jordon v. Parke*, 56 Me. 557; *Field v. Stearns*, 42 Vt. 106; *Wiggin v. Day*, 9 Gray, 97; *Whitman v. Merrill*, 125 Mass. 127; *Hitchcock v. Covill*, 20 Wend. 167; 23 Wend. 611; *Devoe v. Brandt*, 53 N. Y. 462; *Am. Ex. Co. v. Willsie*, 79 Ill. 92.

<sup>2</sup> *Supra*, § 233; *Clough v. R. R.*, L. R. 7 Ex. 26; see *Babcock v. Lawson*, L. R. 4 Q. B. D. 394; *Negley v. Lindsay*, 69 Penn. St. 217; *Lepper v. Nuttman*, 35 Ind. 384; *Mendenhall v. Treedway*, 44 Ind. 131.

<sup>3</sup> *Schutt v. Large*, 6 Barb. 373.

<sup>4</sup> *Supra*, § 211; *Adams v. Stevens*, 49 Me. 362; *Root v. Bancroft*, 8 Gray, 619; *White v. Wilson*, 6 Blackf. 448; *Burke v. Anderson*, 40 Ga. 535; *Young v. Cason*, 48 Mo. 259.

<sup>5</sup> *Infra*, § 734.

<sup>6</sup> See *supra*, §§ 182, 211; *infra*, §§ 733, 793.

<sup>7</sup> *Higsons v. Burton*, 26 L. J. Ex. 342; *Hollins v. Fowler*, L. R. 7 H. L. 757; *R. v. Gillings*, 1 F. & F. 36; *R. v. Hench*, R. & R. 163; *Cunday v. Lindsay*, L. R. 3 Ap. Cas. 459; *aff. Lindsay v. Cunday*, L. R. 2 Q. B. D. 96; *Hardman v. Booth*, 1 H. & C. 803; *Moody v. Blake*, 117 Mass. 23; *Lecky v. McDermott*, 8 S. & R. 500; *Barker v. Dinsmore*, 72 Penn. St. 427; *Striker v. McMichael*, 1 Phila. 89; *State v. Lindenthal*, 5 Rich. 237; *State v. Brown*, 25 Iowa, 561. As to *bona fide* purchasers see *supra*, §§ 211, 291; *infra*, 347, 352, 733. That goods fraudulently obtained may be pursued, see *infra*, § 734.

<sup>8</sup> *Kingsford v. Merry*, 1 H. & N. 503; *Cunday v. Lindsay*, *ut supra*; *infra*, §§ 730-2. See *Thoroughgood's case*, 2 Co. 9a; *Foster v. Mackinnon*, L. R. 4 C. P. 704.

<sup>9</sup> *Ibid.*

taining being known to the seller, there being a mistake of identity induced by the buyer's fraud, it was held that the goods could be recovered from a third party, to whom they had been *bona fide* sold.<sup>1</sup>—This distinction is clearly put by Mr. Benjamin.<sup>2</sup> The vendor "may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. But in the mean time, and until he elects, if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person. *If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the possession of the goods, there is no sale, and he who obtains such possession by fraud can convey no property in them to any third person, however innocent, for no property passed to himself from the true owner.*" The test is, did the alleged vendor *intend* to pass the property to the party taking? If so, the property passed, no matter how great was the fraud practised on him.<sup>3</sup> And where there is an intention by the vendor to pass the title, no matter how fraudulently false may have been the transferee's representation of his condition and means, the title passes.<sup>4</sup>

§ 293. As will be hereafter more fully seen,<sup>5</sup> when a contract is to be performed in successive instalments or deliveries, and when these instalments and deliveries are interdependent, so that failure in one makes succeeding instalments or deliveries comparatively valueless, then such failure by the promisor entitles the promisee to rescind. But the insolvency of a purchaser, on an executory contract, does not of itself imply

Rescission may be granted on failure in part performance.

<sup>1</sup> *Cunday v. Lindsay*, *ut supra*; and see fully *supra*, §§ 182, 211, 291; *infra*, §§ 347, 352.

<sup>2</sup> *Sales*, 3d Am. ed. § 433.

<sup>3</sup> *Clough v. R. R.*, L. R. 7 Ex. 26. That *bona fide* receivers for value of articles lost or stolen receive no title, see *Benj. on Sales*, 3d Am. ed. § 6.

<sup>4</sup> *Attenborough v. St. Katherine's Dock Co.*, L. R. 3 C. P. D. 450. See *Babcock v. Lawson*, L. R. 5 Q. B. D. 284; and cases cited *supra*, §§ 182, 211, 291; *infra*, §§ 347, 352. That there is no market overt in this country, see *infra*, § 734.

<sup>5</sup> *Infra*, §§ 580, 601, 898, 919.

an assent on his part to a rescission of the contract. Notwithstanding his insolvency, the purchaser may be able to pay for the thing purchased; and to assume that insolvency by itself implies permanent disability, would be to assign to it the incidents of civil death, and to invest it, therefore, with permanent disqualifications utterly inconsistent with a system which, as is the case in England and the United States, maintains the continued civil existence of the insolvent, and provides for his restoration to business activity. But an insolvent may by implication throw up a contract of purchase by which he is bound, and this implication is held to exist where the insolvent, in notifying the vendor of his insolvency, says nothing of his desire to hold on to his bargain.<sup>1</sup>

<sup>1</sup> *Morgan v. Bain*, L. R. 10 C. P. 15; 1031 *et seq.* That there may be rescission by lapse of time, see *infra*, § 1042. *Chalmers ex parte*, L. R. 8 Ch. 294; *Tondeur ex parte*, L. R. 5 Eq. 160. On the subject of rescission by rectification see *infra*, § 661; by release, *infra*, §§ 852 *et seq.*

## CHAPTER XIV.

## IMPOSSIBILITY.

- Original impossibility may be either subjective or objective ; may be temporary or permanent : may be partial or absolute, § 296.
- Subsequent impossibility may be either culpable or non-culpable ; temporary or permanent ; partial or absolute, § 297.
- Non-existence of thing at the time a defence, § 298.
- And so of non-alienability of thing disposed of, § 299.
- When essential quality of thing promised is destroyed, contract is void, § 300.
- When both parties know of impossibility, this avoids, § 301.
- If promisor knows or ought to know of impossibility, this is no defence, § 302.
- Otherwise, when promisee knows or ought to know of impossibility, § 303.
- Mere improbability does not vacate, § 304.
- Subsequently occurring legal prohibition a defence, § 305.
- Otherwise as to foreign prohibition, § 306.
- Legal impossibility induced by promisor's negligence no defence, § 307.
- Casus* is a disaster which due diligence could not avert, § 308.
- No defence when negligently encountered, § 309.
- But perfect caution not required, § 310.
- Casus* not a defence when the risk is one promisor took, § 311.
- Party making performance of a contract impossible cannot complain, § 312.
- Casual impossibility must be permanent and absolute, § 313.
- Impossibility of delivery a defence, § 314.
- But not of fungible things, § 315.
- Subsequent non-producibility of goods a defence, § 316.
- After completion of sale loss falls on purchaser, § 317.
- Covenant of tenant not defeated by *casus*, § 318.
- Exception in case of public war, § 319.
- Casus* a defence to suit against bailee, § 320.
- Bail bonds and other guarantees relieved by *casus* or necessity, § 321.
- Subsequent impossibility a defence to a suit on contract for work, § 322.
- Subjective incapacity no defence to duty not exclusively personal, § 323.
- Incapacity for marriage a defence to an engagement to marry, § 324.
- Incapacity self-inflicted no defence, § 325.
- Work to be paid for though thing is subsequently destroyed, § 326.
- Common carrier may defend on ground of *casus* but not of fire, § 327.
- When there is an alternative still open, impossibility does not exist, § 328.

Bond with an impossible condition is void, § 329.	Impossibility may be permanent or temporary, § 331.
Partial impossibility abates <i>pro tanto</i> , § 330.	

§ 296. IMPOSSIBILITY may be either original or subsequent; the first being when the impossibility existed at the time of the making of the contract, the second coming into existence subsequent to that period. Original impossibility may be either objective or subjective; the first being where the thing which is the object of the contract is not capable of being done; the second where the parties are incapable of doing such thing. Original impossibility, also, may be either temporary or permanent; and may be partial or absolute.<sup>1</sup> As will be hereafter more fully seen, temporary necessity only temporarily suspends the remedy,<sup>2</sup> and partial necessity only abates *pro tanto*.<sup>3</sup>

§ 297. With regard to subsequent impossibility the main question is, whether or no the impossibility is imputable to the promisor's misconduct. If there be no such imputability, the promisor, as will be hereafter seen, is not liable.<sup>4</sup> Subsequent impossibility, also, may be either temporary or permanent, partial or absolute.<sup>5</sup> By the Roman law, liability ceases when the particular thing promised in the obligation becomes without fault impossible. "Quod nullius esse potest, id ut alicujus fieret, nulla obligatio valet efficere."<sup>6</sup>

<sup>1</sup> For illustrations, see *infra*, §§ 298 *et seq.*; Windscheid, Pandekt. § 264, where are cited a series of authorities from the Roman law establishing these distinctions. In Koch's Forderungen, ii. § 107, it is stated in general terms, that if the act is itself objectively impossible, no obligation arises, but that the promisor is liable when either the impossibility is purely subjective, dependent upon his own incapacity, or when he brings about by his own act an objective impossibility. The subject is discussed with great fulness and

subtlety by Mommsen, in his treatise on Die Unmöglichkeit der Leistung (1853) (pp. 420), to which numerous references will be made in this chapter.

<sup>2</sup> *Infra*, § 331.

<sup>3</sup> *Infra*, § 330.

<sup>4</sup> *Infra*, §§ 308 *et seq.*

<sup>5</sup> *Infra*, §§ 330-1; Trest v. Orono, 26 Me. 217; see Woodward v. Cowing, 13 Mass. 216; Colville v. Besly, 2 Denio, 139; Murray v. Carrot, 3 Call, 373; Wharton v. O'Hara, 2 Nott. & McC. 65.

<sup>6</sup> L. 182, D. de R. J. (50, 17).

When the thing to be done is specifically limited, and this becomes impossible, an equivalent cannot be called for. The rule is tersely expressed by Celsus:<sup>1</sup> “*Impossibilium nulla obligatio.*” The meaning of the rule, so argues Mommsen,<sup>2</sup> is clear, if limited to unilateral obligations to do a single thing. The whole duty in such cases falls away when impossibility intervenes. According to Puchta,<sup>3</sup> obligations, in this relation, are to be divided as follows:—1. Obligations which are specifically contracted, being immediately contemplated by the parties.—2. Obligations which take their origin from an act of the parties, without being expressly designed. Under this head fall the obligations of an agent incidental to the assumption of the agency.—3. Obligations which originate in a condition, such as joint ownership.—With regard to the first, viz., obligations specifically contracted, the primary inquiry is, whether, at the time of the contract, the parties knew of the impossibility. If they did, the whole transaction is inoperative.<sup>4</sup> It is otherwise, however, when the promisee was at the time ignorant of the impossibility.<sup>5</sup>

§ 298. Suppose the thing contracted for did not exist at the time of the agreement, are the parties bound? If they were ignorant of such non-existence, not only cannot specific performance be required, but a binding contract cannot be said to have been consummated.<sup>6</sup> This is the rule where the thing bargained for never existed;<sup>7</sup> and where, having existed, it was destroyed at the time of the agreement.<sup>8</sup> “The assent of the parties, being founded on a mutual mistake of fact, was really no assent.”<sup>9</sup> This has been held to be the case where A. sold B. a cargo of goods which, at the time of the bargain, had been lost at sea,

Non-existence of thing at time is a defence.

<sup>1</sup> L. 185, D. de R. J. (50, 17).

<sup>2</sup> Op. cit. 103.

<sup>3</sup> Pandekten, § 249.

<sup>4</sup> See *infra*, § 301; and see an illustration of this in L. 31, D. de O. et A. (44, 7).

<sup>5</sup> *Infra*, § 303.

<sup>6</sup> *Supra*, §§ 181 *et seq.*

<sup>7</sup> *Hills v. Sughone*, 15 M. & W. 253; *Clifford v. Watts*, L. R. 5 C. P. 577;

*Allen v. Hammond*, 11 Pet. 63, 71;

*Thompson v. Gould*, 20 Pick. 139;

*Rice v. Dwight Man. Co.*, 2 Cush. 80,

86; *Franklin v. Long*, 7 Gill & J. 407;

*Walker v. Tucker*, 70 Ill. 527.

<sup>8</sup> *Hitchcock v. Giddings*, 4 Price,

135; *Rice v. Man. Co.*, 2 Cush. 80;

*Marvin v. Bennett*, 8 Paige, 312.

<sup>9</sup> *Benj. on Sales*, 3d Am. ed. § 77.

neither party being aware of the fact.<sup>1</sup> Bankruptcy of a corporation, also, unknown at the time by vendor and purchaser of certain of its shares, will be a defence to a suit on the contract of purchase;<sup>2</sup> and so of an agreement to take shares in a company which has no power to issue such shares;<sup>3</sup> and of an agreement to sell a horse which (neither party knowing the fact) is, at the time of the bargain, dead.<sup>4</sup> It has also been ruled that where a party holding an estate for another's life, agrees to sell his interest in such estate in ignorance that such other person is at the time dead, the agreement is void;<sup>5</sup> and that an expired life insurance of a deceased person is not revived by the paying and receiving, after his death, by the insurers, of a premium, the party paying and the party receiving being, at the time, ignorant of the death.<sup>6</sup> But a specific agreement to pay rent is not vacated by the fact that the property leased turns out, without fault of the lessor, of far less value than was supposed. This, as is elsewhere seen, is the case with leases of improved land when the improvements have been destroyed by fire;<sup>7</sup> and the same rule is applied to leases of mines when the mine turns out to be unworkable, which, if there be a lease covenanting to pay a fixed rent, is no defence to the covenant.<sup>8</sup> On the other hand, when rent is payable in the shape of a royalty on minerals in the soil, no

<sup>1</sup> *Hastie v. Couturier*, 9 Exch. 102; *lins*, L. R. 7 Q. B. 144; see *supra*, §§ *Couturier v. Hastie*, 5 H. L. C. 673; 181-8.  
see *Gibson v. Pelkie*, 37 Mich. 380.

<sup>2</sup> *Emerson's case*, L. R. 1 Ch. 433; *Pollock*, Wald's ed. 425, citing explanation in L. R. 3 Ch. 291, by Page Wood, L. J.

<sup>3</sup> *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, 222; *Alison ex parte*, L. R. 15 Eq. 394; 9 Ch. 1; *Campbell ex parte*, L. R. 16 Eq. 417; 9 Ch. 1.

<sup>4</sup> 1 Story Eq. Jur. § 143; *Pothier*, *Cont. de Vente*, § 4, cited *Couturier v. Hastie*, 5 H. L. C. 673.

<sup>5</sup> *Strickland v. Turner*, 7 Ex. 208; *Hitchcock v. Giddings*, 4 Price, 135; *Cochrane v. Willis*, L. R. 1 Ch. 58; see *Jones v. How*, 9 C. B. 1; *Coates v. Col-*

*lins*, L. R. 7 Q. B. 144; see *supra*, §§ 181-8.  
<sup>6</sup> *Pritchard v. Ins. Co.*, 3 C. B. N. S. 622. Mr. Wald (*Wald's Pollock*, 427) cites to same effect, *Mutual Insurance Co. v. Ruse*, 8 Ga. 534. With the cases in the text may be grouped *Allen v. Hammond*, 11 Pet. 63, where it was held that an agreement with an attorney to prosecute, for a percentage, a claim against a foreign government, would be vacated when it turned out that at the time of the agreement the claim had been allowed.

<sup>7</sup> *Infra*, § 318.

<sup>8</sup> *Bute v. Thompson*, 13 M. & W. 487; *Ridgway v. Sneyd*, Kay, 627.



royalty is payable when no minerals are found. And a covenant to work a mine cannot be enforced if it turn out that the mine is exhausted.<sup>1</sup> Where an insurance was effected on certain goods on a particular ship, and there were no such goods on board that ship, it was held that the premium might be recovered back.<sup>2</sup> And when a thing sold is absolutely valueless at the time of sale, this avoids the contract.<sup>3</sup> But when the consideration has been in part received, but its full reception made impossible by *casus*, the price paid cannot be recovered back.<sup>4</sup> Non-existence at the time of sale, it should be remembered, is no defence when the party insures the production of the thing at the time of the delivery;<sup>5</sup> and when the thing has "a *potential* existence, that is, things which are the natural product or expected increase of something already belonging to the vendor."<sup>6</sup> Hence, a lessee may convey to a lessor all the crops which may be grown on the leased land during the term, and no delivery of the crops after they are harvested is necessary even against attaching creditors.<sup>7</sup> A sale of a colt to be hereafter foaled from a certain mare is valid even against creditors of the owner.<sup>8</sup>

<sup>1</sup> Ridgway v. Sneyd, Kay, 627; Clifford v. Watts, L. R. 5 C. P. 577; Walker v. Tucker, 70 Ill. 527.

<sup>2</sup> Hammond v. Allen, 2 Sumn. 396; Park on Ins. 6th ed. 1809. As to recovery back, see generally *infra*, §§ 742 *et seq.*

<sup>3</sup> Leger v. Bonnaffé, 2 Barb. 475; *infra*, §§ 742-4.

<sup>4</sup> *Infra*, § 745.

<sup>5</sup> *Infra*, § 311.

<sup>6</sup> Benj. on Sales, 3d Am. ed. § 78; Robinson v. Macdonnell, 5 M. & S. 228; Smith v. Atkins, 18 Vt. 461; Hodges v. Harris, 6 Pick. 360; Lewis v. Lyman, 22 Pick. 437; Lucas v. Birdsey, 41 Conn. 357; Capron v. Porter, 43 Conn. 389; Heald v. Ins. Co., 111 Mass. 38; Sanborn v. Benedict, 78 Ill. 309; Cotten v. Willoughby, 83 N. C. 75.

<sup>7</sup> Bellows v. Wells, 36 Vt. 599.

<sup>8</sup> Hull v. Hull, 48 Conn. 250; Fonville v. Casey, 1 Murph. N. C. 389. In Hull v. Hull, *ut supra*, the court said: "It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Pars. on Cont. (5th ed.) 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In Fonville v. Casey, 1 Murphy N. C. 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare, owned by the defendant, might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory

§ 299. Suppose the law of the jurisdiction forbids the alienation of a particular thing; is a contract to dispose of this thing valid? In the Roman law, where these restrictions are not uncommon, this incapacity is a defence to a suit for the performance of a contract. When, by the policy of the law, a thing cannot be alienated, it cannot be sued for.<sup>1</sup> The same position is illustrated by our own law in reference to champertous contracts,<sup>2</sup> and to contracts for sale of smuggled goods and intoxicating liquors when such sale is prohibited.<sup>3</sup> Mr. Pollock<sup>4</sup> places in the same category crown jewels, and ships in the royal navy, which cannot be the subject of private ownership.

§ 300. When a thing sold is deficient in a quality essential to its market value, the sale may be rescinded, or the vendor held liable on breach of warranty. Supposing both parties were ignorant at the time of the defect, the contract fails to bind on ground of *error in substantia*.<sup>5</sup> On a similar principle may be explained rulings to the effect that when it is promised that a certain person will do a particular thing, the sickness or death of that person, supposing that the duty be personal and not one to be done by a substitute, will be a defence to a suit on the promise.<sup>6</sup> Objective destruction falls under the same

to something which he actually has. And in *McCarty v. Blevins*, 5 Yerg. 195, it was held that where A. agrees with B. that the foal of A.'s mare shall belong to C., a good title vests in the latter when parturition from the mother takes place, though A. immediately after the colt was born, sold and delivered it to D."

In the Roman law, the stipulation of a thing whose delivery is objectively impossible (*quæ dari non potest*) is not in itself binding. This principle is applied to things which are non-existent, nor does it matter whether they never existed at any time, or they ceased to exist only after the contract was executed. Under the same cate-

gory fall things whose alienation is forbidden by law. And the rule applies as much to stipulations to do impossible things as to deliver things which are non-existent. (For authorities, see Mommsen, *op. cit.* 115.)

<sup>1</sup> Mommsen, *op. cit.* 22.

<sup>2</sup> *Infra*, § 421.

<sup>3</sup> *Infra*, §§ 360 *et seq.*

<sup>4</sup> Pollock, Wald's ed. 349.

<sup>5</sup> Savigny, *System*, iii. p. 283; *supra*, § 186.

<sup>6</sup> *Robinson v. Davison*, L. R. 6 Ex. 269; *Boast v. Frith*, L. R. 4 C. P. 1; *Stewart v. Loring*, 5 Allen, 306. For other cases see *infra*, §§ 323, 613; Mommsen, *ut supra*, 203.

head; and when the material by which a contract is to be executed is destroyed by *casus*, then the contract falls.<sup>1</sup> In this line may be considered an interesting case elsewhere noticed, where an agreement was made to let a music hall for a series of concerts, the hall being specially constructed for this purpose, and where it was held that the agreement was conditioned on the continued existence of the hall, and that the subsequent destruction of the hall by fire relieved the party agreeing to let it from liability. "The authorities," said the court, "established the principle that, where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor."<sup>2</sup>

<sup>1</sup> *Infra*, §§ 308, 310, 322; *Taylor v. Caldwell*, 3 B. & S. 838; *Howell v. Coupland*, L. R. 9 Q. B. 462; *aff. L. R. 1 Q. B. D. 258*; *Appleby v. Myers*, L. R. 2 C. P. 651; *Anglo-Egypt. Nav. Co. v. Rennie*, L. R. 10 C. P. 271; *Lake-man v. Pollard*, 43 Me. 463; *Dexter v. Norton*, 47 N. Y. 62; *Spalding v. Rosa*, 71 N. Y. 40.

<sup>2</sup> *Taylor v. Caldwell*, 3 B. & S. 838. *Taylor v. Caldwell* was affirmed subsequently in *Howell v. Coupland*, L. R. 9 Q. B. 462; *aff. L. R. 1 Q. B. D. 258*; *infra*, § 314. In *Russell v. Levy*, 2 Low. Can. 457 (cited *Benj. on Sales*, 3d Am. ed. § 570 a), the point at issue is thus stated by Sir J. Stuart, C. J.: "*The sale was not a sale of birch timber generally, but of a specific determined quality of timber, to be collected north*

*of Quebec, to be piled on a wharf during the winter, measured and delivered according to contract; and it having been destroyed by fire, it could not be replaced by any other description of timber. Now this timber was destroyed by vis major, without any fault or neglect on part of Loundes (the contractor), who was thereby prevented from fulfilling his contract, and in such case no liability attaches by law upon the party by reason of the non-execution of the contract.*" That equity will relieve against a forfeiture for a breach of a condition subsequent when caused by *casus*, or fraud, or surprise, see 2 Wh. & T. Lead. Cas. in Eq. 4th ed. 1105; *Eaton v. Lyon*, 3 Ves. Jr. 690; *Henry v. Tupper*, 29 Vt. 358; *Harris v. Troup*, 8 Paige, 423.

§ 301. Should the parties to an agreement know that it is impossible for the object of the agreement to be performed, and should each know that the other knows this impossibility, then the agreement has no legal force, simply because the parties did not intend it to have such force.<sup>1</sup> Nor is a different conclusion to be reached, should it appear that one of the parties did not know that the other party knew the thing to be impossible, making the agreement in order to overreach such other party. He cannot be permitted in such case to make anything out of his own fraud.<sup>2</sup> Hence, specific performance will not be enforced when both parties know that the party contracting to convey has no title.<sup>3</sup> And an agreement which both of the parties know is impossible, is void against either.\* —Under this head may be classed agreements to do things which are latently impossible, and which are apparently possible only because their terms are not fully examined. This is illustrated by an old case in which the bargain was that the defendant, for a fixed price, was to deliver to the plaintiff two grains of rye on the following Mouday, four grains on the Monday after, and so on, doubling every succeeding Monday for a year. The defendant, to a suit on the contract, demurred, on the ground of impossibility. The court, however, seemed to think that this was not such an impossibility as to make the contract void; but the suit being compromised there was no final judgment, nor could the intimations of the court be practically carried out.<sup>5</sup> A more rational conclusion was reached in a case where the bargain was to pay as price of a horse, barley, to be reckoned by giving a barley-corn for the first nail in his shoes, two for the second, and four for the third, which came to 500 quarters of barley for 32 nails. The bargain was treated by the court as a nullity, and a verdict

<sup>1</sup> See *supra*, § 175.

<sup>2</sup> See *supra*, §§ 202 *et seq.*; *Faulkner v. Lowe*, 2 Exch. 595; *Stevens v. Coon*, 1 Pinney, Wis. 356.

<sup>3</sup> *Love v. Cobb*, 63 N. C. 324; see *Gilmer v. Gilmer*, 42 Ala. 9.

<sup>4</sup> *Leake*, 2d ed. 688; *Hall v. Caze-nove*, 4 East. 477; *Duverger v. Fellows*, 5 Bing. 248; 10 B. & C. 826; *supra*, § 202.

<sup>5</sup> *Thornborough v. Whitacre*, 2 L. Ray. 1164; 6 Mod. 305.

directed for the value of the horse.<sup>1</sup> And this is the right view. If there is no fraud in such bargains (and if there be fraud this by itself vacates), each party is supposed to know that which a little attention would enable him to know; and the bargain, being to do a thing known by both to be either impossible or preposterously unconscionable, cannot be regarded as binding.

§ 302. A party who knows or ought to know of the non-existence of a thing he contracts to deliver makes himself, however, liable to the other contracting party for non-delivery. Had he, the vendor, not made the promise, the purchaser might have gone elsewhere, and thus obtained what he needed; and the vendor, therefore, becomes liable for the non-performance.<sup>2</sup> A party, for instance, agrees with another to obtain at the island of Ichaboe, a cargo of guano, to be delivered in England. There is not enough guano at Ichaboe to fill the order. The party contracting to deliver is nevertheless bound, as he ought to have known whether the guano could be found at Ichaboe in sufficient quantity.<sup>3</sup> The same reasoning precludes a contractor undertaking to construct public works from recovering damages from the corporation employing him on the

If promisor knows or ought to know of impossibility, it is no defence.

<sup>1</sup> James v. Morgan, 1 Lev. 111; Hardwicke, L. C., Chesterfield v. Janssen, 2 Ves. Sen. 155; Leake, 2d ed. 692.

<sup>2</sup> See Francis v. Cockrell, L. R. 5 Q. B. 503.

<sup>3</sup> Hills v. Sughrue, 15 M. & W. 253. Mr. Pollock queries, "if this case would now be so decided. It seems," he adds, "to fall within the rule in Taylor v. Caldwell," *supra*, § 300. But Hills v. Sughrue can be sustained on the ground that the party contracting to find guano ought to have known what he was about. I do not think that either this case, or the citations given by Mr. Pollock from the Roman law, sustain his position, that impossibility of this kind, *i. e.* extrinsic, "is no excuse for the failure to perform

an unconditional contract, whether it exists at the date of the contract or arises from events which happen afterwards." The cases he proceeds to cite to this effect (after Hills v. Sughrue) are cases of *casus* to which the party negligently exposed himself. To this class belong cases in which a party who ought to take cognizance of a certain risk makes a contract exposing himself to it. If he takes such risk, ready to reap its advantages if the calamity does not occur, he must bear the loss should it occur. Thus a builder who undertakes to build a house cannot set up as an excuse for non-performance that he found the soil unexpectedly soft and treacherous. Dermott v. Jones, 2 Wall. 1; Tompkins v. Dudley, 25 N. Y. 272.

ground that there were some specifications in the contract which were impracticable, leading him in this way to incur fruitless expense. He should have acquainted himself with the nature of the contract before signing it.<sup>1</sup> And it is declared to be "a general proposition of law, that when one man engages with another to supply him with a particular article or thing, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used, and to which it is to be applied." . . The only recognized exception is in "the case of some defect which is unseen and unknown, and undiscoverable, not only unknown to the contracting parties, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination."<sup>2</sup>—According to Mommsen, if the promisee did not at the time know, and the promisor did know of the impossibility, then the promisee is entitled to be recompensed for the loss he was subjected to by the non-performance of the contract. This, however, presupposes non-negligent ignorance on his part of the impossibility. If his ignorance could have been avoided by ordinary care, then, if there was no fraud, he cannot complain. He took a contract for a thing which he ought to have known was impossible, and on this contract he cannot recover. "Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire."<sup>3</sup>—The liability in such cases of the promisor (Schuldner) is based on the assumption, that on entering on such a contract he was guilty of either fraud (*dolus*), or such negligence as a good business man under such circumstances ought not to exhibit (*culpa*). The promisor, therefore, is only liable for damages in such cases when he knew at the time that performance was impossible, or when his ignorance in this respect was culpably negligent.

<sup>1</sup> *Thorn v. Mayor of London*, L. R. 9 Ex. 163; 10 Ex. 112; aff. L. R. 1 App. 311. R. R., L. R. 2 Q. B. 412; L. R. 4 Q. B. 379. To same effect is *Walden v. Cas. (H. of L.)* 120; and see *infra*, § Finch, 70 Penn. St. 461. That selling for particular purpose implies fitness

<sup>2</sup> *Kelly, C. B., Francis v. Cockrell*, L. R. 5 Q. B. 503; citing *Readhead v.* for such purpose, see *supra*, § 221.

<sup>3</sup> L. 203, D. de R. J. (50, 17).

§ 303. The promisee cannot, *a fortiori*, recover on the contract if he ought to have known the thing to have been non-existent, or the promise to be, for other grounds, nugatory. This is illustrated in a case in which the plaintiff, a landlord, sued the defendant, his tenant, on a covenant by the latter, in which he undertook to dig from the leased premises not less than 1000 tons of clay annually, paying a specific royalty. It was held a defence that there never was as much as 1000 tons of clay on the land.<sup>1</sup> This would have been the law even supposing both parties were innocently ignorant of the non-existence of the clay. But the defendant's case was strengthened by the fact that this non-existence was a circumstance of which the plaintiff, with due diligence, could have been aware.<sup>2</sup>

When promisee knows, or ought to know, of impossibility, contract is void.

§ 304. "If a man is bound to another in 20*l.* on condition *quod pluvia debet pluer*e *cras*, there *si pluvia non-pluit cras*, the obligor shall forfeit the bond, though there was no default on his part, for he knew not that it would not rain. In like manner, if a man is bound to me on condition that the Pope shall be here at Westminster tomorrow, then, if the Pope comes not here, there is no default on defendant's part, and yet he has forfeited the obligation."<sup>3</sup> It is true that if there are wagering contracts, they will not be enforced. But it is competent for one party to undertake to indemnify another, should a certain improbable contingency occur. All insurance contracts are to this effect.—But to constitute impossibility in the sense in which the term is here considered, it is not necessary to prove that there is no possible way in which the event in question could occur. It is enough if, according to the ordinary operation of natural laws, as they existed at the time in litigation, the event in question could not have been expected without what would be equivalent to a supernatural interposition. Of course we must take the tests of the specific period in determining the limits of these natural laws. Fifty years ago it was impossible for an

Mere improbability does not vacate agreement.

<sup>1</sup> Clifford v. Watts, L. R. 5 C. P. Sneyd, Kay, 627; Walker v. Tucker, 577. 70 Ill. 527.

<sup>2</sup> See to same effect Ridgway v. <sup>3</sup> Brien, C. J., Mich. 22 ed. 4-26, adopted in Pollock on Cont. 3d ed. 372.

event occurring in London this morning to be known in New York this afternoon; now there are no business contracts that are not affected by intelligence so received. The term "impossible," therefore, is not to be used in an absolute sense; and it is enough to constitute impossibility that the event is so unlikely to occur that no business man could be influenced by the possibility of its occurrence.—"In matters of business a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost." "A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible, by some very expensive contrivance, to recover it. So, if a ship sustains such damage that it would not be reasonably practicable to repair her, having regard to the cost, the ship is said to be totally lost."<sup>1</sup> But this does not apply, as will presently be seen, to risks taken by a party,<sup>2</sup> nor to cases in which there is an alternative still open.<sup>3</sup>

§ 305. To a contract to do a particular thing it is also a defence that the service promised has subsequently been absolutely prohibited by law.<sup>4</sup> In a modern English case, the defendant had leased certain land with a covenant that only ornamental buildings should be erected by him on certain adjacent land he retained. This adjacent land, however, was taken and used for a station by a railroad company, under a parliamentary power. It was held that this intervention of the legislature relieved the defendant from his obligation to keep the land free from any buildings that were not ornamental.<sup>5</sup> And to a suit on a recognizance alleged to be forfeited, it is a

<sup>1</sup> Maule, J., *Moss v. Smith*, 9 C. B. 103, cited Leake, 2d ed. 682.

<sup>2</sup> *Infra*, §§ 308, 311.

<sup>3</sup> *Infra*, § 328, 629.

<sup>4</sup> *Wood v. Griffith*, 1 Swanst. 55; *Brown v. Mayor*, 9 C. B. N. S. 726; *Anglesea v. Rugeley*, 6 Q. B. 107; *Davis v. Carey*, 15 Q. B. 418; *Wynn v. R. R.*, 5 Ex. 420; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Baylies v. Fettyplace*, 7 Mass. 325; *Sears v.*

*Boston*, 16 Pick. 357; *Jones v. Judd*, 4 N. Y. 412; *Presb. Ch. v. N. Y.*, 5 Cow. 538; *Claney v. Overman*, 1 Dev. & Bat. 402; *Stone v. Dennis*, 3 Porter, 231; *Brown v. Dillahunty*, 4 Sm. & M. 714. As to bail-bonds, see *infra*, § 321.

<sup>5</sup> *Baily v. De Crespigny*, L. R. 4 Q. B. 180; see *Mills v. East London Union*, L. R. 8 C. P. 79.



defence that the party whom the bail undertook to deliver was intermediately taken out of the custody of the bail by legal process in the state to whose laws the recognizance was subject.<sup>1</sup> It is otherwise, as will be seen, when the arrest is in a foreign state.<sup>2</sup>—It may happen that an injunction, at the suit of a third party, is served on a party to a contract, prohibiting from performing his part in the contract. If so, this is a defence to a suit for specific performance, though it might not be a defence to a suit for damages if the party enjoined, by his negligence or other improper conduct, exposed himself to the injunction. Or, aside from the question of injunction, the doing of the thing contracted may be made subsequently to the contract illegal, as when during the pendency of a foreign war the furnishing of supplies of a particular kind is interdicted.<sup>3</sup> Whenever, in any way, performance becomes illegal, then performance cannot be exacted.<sup>4</sup>—In a suit against a carrier, it is a good defence that the goods were taken from the carrier by legal process.<sup>5</sup>—An embargo which prevents the performance of a contract only suspends, but does not extinguish the obligation;<sup>6</sup> and so of a war between the countries of the obligor and of the obligee.<sup>7</sup> And a party who insures against a particular event is not relieved by the fact that the event in question is brought about by the action of the public authorities.<sup>8</sup> Subsequent legislation also does

<sup>1</sup> *Infra*, § 321.

<sup>2</sup> *Ibid.*

<sup>3</sup> See *infra*, § 473.

<sup>4</sup> *Jones v. Judd*, 4 N. Y. 412. That a contract to violate a statute cannot be enforced, see *infra*, §§ 360 *et seq.* That ordinarily a contract cannot be modified by subsequent litigation, see *infra*, § 367.

<sup>5</sup> *Savannah, etc., R. R. v. Wilcox*, 48 Ga. 432. A lessee who is dispossessed by military authority during war, his lessor having gone within the enemy's lines, is released from the payment of the rent accruing during the period of his dispossession. *Gates*

*v. Goodloe*, 101 U. S. 612. See more fully, *infra*, §§ 319, 473.

<sup>6</sup> *Hadley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325; see *Geipel v. Smith*, L. R. 7 Q. B. 404; *Jackson v. Ins. Co.*, L. R. 10 C. P. 125; *The Teutonia*, L. R. 3 Ad. & E. 394; L. R. 4 P. C. 171.

<sup>7</sup> *Infra*, § 476; *Reid v. Hoskins*, 4 E. & B. 979; 6 E. & B. 953; *Esposito v. Bowden*, 7 E. & B. 763; and cases cited *infra*, § 476. That temporary impossibility only suspends remedy, see *infra*, § 331.

<sup>8</sup> *Brown v. Ins. Co.*, 1 E. & E. 853; *infra*, § 311; see *infra*, §§ 473 *et seq.*

not excuse when it merely makes the duty burdensome and expensive.<sup>1</sup>

§ 306. It has been said that "the law which renders the performance impossible, and, therefore, excuses failure, must be a law operative in the state where the obligation was assumed, and obligatory in its effect upon her authorities ;"<sup>2</sup> and for this reason it has been held that to a suit on a recognizance that an arrested party would appear to take his trial in a particular state, it is no defence that after the recognizance had been given he voluntarily went into another state, and was there arrested and delivered up on a requisition from a third state where he was convicted and sentenced, and thus taken out of the power of his bail.<sup>3</sup> It has been also held that confiscation of goods at a foreign port is no defence to a suit for non-delivery of the goods, such confiscation not being in any way imputable to the shipper;<sup>4</sup> and that quarantine prohibition at a port to which a vessel was chartered is no defence to a suit against a freighter for not furnishing a cargo.<sup>5</sup> Where, also, "a cargo of petroleum was shipped under a bill of lading for delivery at a foreign port, stipulating that it should be taken out by the shipper within a fixed time, it was held that the freight was earned upon arrival ready for delivery, and that the shipper was not excused from taking the cargo and paying the freight by reason of a prohibition at the port against landing such a cargo."<sup>6</sup> But where an unloading is to be by concurrent act of both parties, and it is forbidden by the port authorities on account of a threatened bombardment, neither can recover.<sup>7</sup> "The delay having happened without default on either side, and neither having undertaken by contract, express or im-

<sup>1</sup> Baker v. Johnson, 42 N. Y. 126; Haskill v. Sevier, 25 Ark. 152; Jacobway v. Denton, 25 Ark. 625.

<sup>2</sup> See *infra*, § 321.

<sup>3</sup> Taylor v. Taintor, 16 Wall. 366; S. C., 36 Conn. 242; State v. Horn, 70 Mo. 466; Wh. Cr. Pl. & Pr. §§ 28-33; see *contra*, Belding v. State, 25 Ark. 315; and for further distinctions, *infra*, § 321.

<sup>4</sup> Spence v. Chodwick, 10 Q. B. 517; Splidt v. Heath, 2 Camp. 57.

<sup>5</sup> Barker v. Hodgson, 3 M. & S. 267. See Blight v. Page, 3 B. & P. 295; Knowles v. Dabney, 105 Mass. 437.

<sup>6</sup> Cargo ex Argos, L. R. 5 P. C. 134. The statement of this point is taken from Leake, 2d ed. 714.

<sup>7</sup> Ford v. Cotesworth, L. R. 4 Q. B. 127.

plied, that there should be no delay, the loss must remain where it falls.”<sup>1</sup> No doubt when the question arises in what way a contract is to be construed, the courts of one state will refuse to be bound by the action of the authorities of another state; and no doubt the prevalent opinion now is that no state is called upon to give effect to another state’s revenue laws.<sup>2</sup> But it is by no means clear that the principle that the prohibition of a foreign state is no defence to a suit for non-performance of a contract is not unduly extended when it is applied to contracts to be performed in such state. The better view is that in all that concerns the performance of a contract the law of the place of performance is to determine.<sup>3</sup> And the cases here cited, so far as they conflict with this rule, may be explained on the ground, hereafter to be considered, that the promisor, in such cases, took on him the risk.<sup>4</sup>

§ 307. In accordance with the distinction already taken, a legal incapacity resulting from the promisor’s negligence, is no defence. Thus a railroad company which permits its power to purchase land to expire by legislative limitation, cannot set up such loss of power as a defence to a suit for the price of land it previously agreed to purchase.<sup>5</sup>

Legal impossibility induced by promisor’s negligence no defence

§ 308. *Casus* is a disaster so extraordinary that its contingency would not be looked to by good business men in the particular specialty as something within the range of probability. As convertible with *casus* is frequently used the term “act of God.” As “acts of God” are understood such extraordinary disturbances as “could not have been prevented by any amount of foresight and pains and care reasonably to be expected” from the party setting up this disturbance as excusatory.<sup>6</sup> “Inevitable accident” is a term also used to express the same idea;<sup>7</sup> but there are cases (*e. g.*, unexpected interference of strangers,

*Casus* is a disaster which due diligence could not avert.

<sup>1</sup> *Ibid.*; Leake, 2d ed. 695, 714.

<sup>2</sup> Wh. Con. of Laws, § 484.

<sup>3</sup> Wh. Con. of Laws, § 403, and cases there cited.

<sup>4</sup> *Infra*, § 311.

<sup>5</sup> *Hawkes v. R. R.*, 1 D. M. & G. 737; aff. S. C., 3 De G. & S. 743.

<sup>6</sup> *James, L. J., Nugent v. Smith*, 1 C. P. D. 423. See to same effect *Nichols v. Marsland*, 2 Ex. D. 1.

<sup>7</sup> See Wh. on Neg. § 553.

against which no reasonable prudence could guard) which might be called "inevitable accidents," but could not, in the ordinary sense of the words, be spoken of as "acts of God." It should be remembered, also, that the term "act of God" is used in a popular, and not in either a theological or a scientific sense. By a theist all things are regarded as coming more or less directly from God. By those rejecting belief in a supreme being, the term would be discarded altogether. In a scientific sense, also, the distinction is absurd, since all that science can deal with is government by law; and waiving the position that a government by law is far from excluding the idea of a supreme lawgiver, it cannot be supposed that there is any occurrence not explicable on the hypothesis of a system of order by which the equilibrium of the universe is maintained. But what concerns us more in the present issue is the fact that the term "act of God," as well as that of "inevitable accident," narrows with the gradual discovery of agencies by which catastrophies formerly supposed to be inevitable are now averted. One hundred years ago *casus* would be a good defence to an action against a carrier for a loss which, had the telegram existed in those days, could have been readily averted by summoning aid which it would be negligence in the carrier now not to summon. One hundred years hence the domains of *casus* will be still further restricted. The question of *casus*, therefore, depends upon the diligence shown at the period in litigation by the party setting it up as a defence.<sup>1</sup>

<sup>1</sup> See authorities cited in Wh. on Neg. §§ 114, 553; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Street v. Holyoke*, 105 Mass. 82; *Gray v. Harris*, 107 Mass. 492. "Accident," as a ground of equitable interference, is defined by Mr. Spence (1 Spence's Eq. 628) to be an unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct; and this definition is approved by Mr. Bispham (*Bisp. Eq.* 174). To this, however, it may be objected that if "unforeseen" be taken

in the wide sense, there would be few cases of accident in which equity could interfere, since there are few cases of accident whose contingency could not be in some sense foreseen. (See discussion in Wh. on Neg. §§ 74 *et seq.*) In *The Love Bird*, 44 L. T. 650 (1881), it was held that under the English sailing rules of Sept. 1880, a loss which might have been prevented by the use of the mechanical fog-horn ordered by those rules, was imputable to the negligent ship.

§ 309. It may happen, however, that a person who contracts to do a particular thing, does it in such a way as to encounter an obstacle which prevents the performance. When two or more ways are open to him, he improvidently takes one in which the difficulty is encountered; or he delays action so that he meets a risk he would otherwise have avoided. In such cases the *casus* is no defence. This is the rule in the Roman law,<sup>1</sup> and in our own.<sup>2</sup> If a ship, for instance, collides with another in port through the violence of a storm, no negligence being imputable, this is *casus*; but if she is negligently moored or anchored, so that she is cast loose unnecessarily, then her loss is to be charged to those by whom she was thus left exposed.<sup>3</sup> If the *casus* by which goods are destroyed while in the course of transportation could have been avoided by the exercise, on the part of the carrier, of the diligence usual to good business men of his class, then it constitutes no defence to a suit for a breach of the contract of carriage.<sup>4</sup> But it is not enough, to overcome the defence of *casus*, to say that the *casus* might have possibly been avoided. Such excessive precautions as would make transportation impracticable a carrier is not required to adopt. This duty is satisfied if he take such precautions as are in the long run most conducive to the safe management of the business in which he is concerned.<sup>5</sup>—The

*Casus* no defence when negligently encountered.

<sup>1</sup> L. 22, D. de neg. g. (3, 5); L. 10, § 1, de L. Rhod. (14, 2).

<sup>2</sup> Story's Eq. Jur. § 105; Bispham's Eq. 175; *Caffray v. Darby*, 6 Ves. 496; *Hadley v. Clark*, 8 T. R. 259; *Davis v. Garrett*, 6 Bing. 716; *Parker v. James*, 4 Camp. 112; *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Exch. 208; *Converse v. Brainard*, 27 Conn. 607; *Beebe v. Johnson*, 19 Wend. 500; *New Brunswick St. Co. v. Tiers*, 4 Zab. 697; *Hand v. Baynes*, 4 Whart. R. 204; *Davis v. Davis*, 6 Ired. Eq. 418; *Helm v. Wilson*, 4 Mo. 41; *Vail v. R. R.*, 63 Mo. 230; *Nashville, etc. R. R. v. David*, 6 Heisk. 261; *Seigel v. Eisen*, 41 Cal. 109. That a party cannot recover on

a loss imputable to himself, see §§ 312, 603-4, 716, 747, 901.

<sup>3</sup> L. 29, § 2, D. at Leg. Ag.

<sup>4</sup> *Nugent v. Smith*, L. R. 1 C. P. D. 423; *Denny v. R. R.*, 13 Gray, 481; *Hoadley v. N. Trans. Co.*, 115 Mass. 304; *Hubbard v. Harnden's Ex. Co.*, 10 R. I. 244; *Michaels v. R. R.*, 30 N. Y. 564; *Austen v. Steamboat Co.*, 43 N. Y. 75; *Bostwick v. R. R.*, 45 N. Y. 712; *Morrison v. Davis*, 20 Penn. St. 175; *Read v. R. R.*, 60 Mo. 199; *Pruitt v. R. R.*, 62 Mo. 528. See as to *casus* generally, Wh. on Neg. §§ 553 *et seq.*

<sup>5</sup> *Railroad Co. v. Reeves*, 10 Wall. 176; *Denny v. R. R.*, 13 Gray, 481; *Morrison v. Davis*, 20 Penn. St. 171.

rule before us is applicable to all cases in which a party by unnecessary delay puts it out of his power to perform a promise. Hence, a party who agrees to have his life insured within a certain time is not, if he has unduly delayed his application, relieved from his agreement by the fact that his health became so bad before the expiration of the time that his life was uninsurable.<sup>1</sup>

§ 310. Perfect caution, however, is not required. Were it required, business could not be efficiently conducted.

But perfect  
caution not  
required.

It would be possible, for instance, for a railroad company not only to place watchers along the whole line of their road, but to place watchers to watch the watchers. To require this, however, would be to stop railroad transportation, as no railroad company could carry such a burden. It would be possible, also, to prevent wooden houses from being burned by keeping them perpetually drenched in water; but this would be equivalent to saying that no wood should be used in the construction of houses. Hence it is not necessary to sustain the defence of *casus*, that the calamity could not have been possibly averted. It is enough if it could not have been averted by the exercise of that diligence which is usual among prudent and competent persons charged with the particular duty whose non discharge is in the case in question excused by *casus*.<sup>2</sup> Thus where a sudden frost closes the naviga-

<sup>1</sup> Arthur v. Wynne, L. R. 14 Ch. D. 603. In Lilley v. Doubleday (L. R. 7 Q. B. D. 510), the plaintiff was shown to have forwarded to the defendant goods for the purpose of being warehoused. The contract between the parties was, that the goods should be deposited by the defendant at a store at a specific place; instead of which he deposited a part of them in a place where, without any particular negligence on his part, a fire took place by which they were destroyed. The only point at issue was, whether the fact that the defendant had deposited the goods in a different place from that in which he had contracted to deposit

them, rendered him liable for their destruction by means of a fire which they would have escaped if they had been warehoused in accordance with the contract. The court ruled this point against the defendant. "If a bailee," said Mr. Justice Grove, "elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts, and inherent in the property itself." See comments in London Law Times, Feb. 18, 1882.

<sup>2</sup> Wh. on Neg. §§ 116, 123; Idle v. Thornton, 3 Camp. 274; Nichols v. Marsland, L. R. 10 Ex. 255; Railroad

tion of a river a month earlier than usual, this is a defence to a carrier, though it is possible he might have delivered the goods had he started them two months earlier.<sup>1</sup> So it is a defence that a rail has been broken by a cold snap utterly unprecedented in its severity and earliness; though it is possible to conceive of rails constructed of such a temper and encased with such care as to resist even the extremest cold.<sup>2</sup> On the other hand a collision, which might have been avoided had a proper chart been taken;<sup>3</sup> an explosion of a boiler, which might have been avoided by a proper supply of water;<sup>4</sup> or a destruction by freezing, which might have been avoided by the packing prudent carriers under such circumstances are accustomed to give,<sup>5</sup> cannot be imputed to *casus*.<sup>6</sup>

§ 311. If a party guarantees against an event, he cannot defeat a suit for damages for non-performance on the ground that the event happened.<sup>7</sup> Thus, where a charterer undertakes to unload within a particular time, it is no defence to a suit for a breach of contract in this respect that he was prevented by a storm which was within the ordinary range of anticipation at the time of his contract.<sup>8</sup> It is no defence, also, to a suit on a charter party requiring a ship to be loaded with usual dispatch, that a frost stopped transit through a canal by means of which the cargo would in the ordinary course of travel have been brought to the ship;<sup>9</sup> nor is the burning of a house under construction any defence to a suit against the contractor for non-construction.<sup>10</sup> Nor can the promisor defend him-

Nor a defence when the risk is one the promisor took.

Co. v. Reeves, 10 Wall. 176; Denny v. R. R., 13 Gray, 481; Morrison v. Davis, 20 Penn. St. 171; Bain v. Lyle, 58 Penn. St. 68; Morrow v. Campbell, 7 Port. 41; Selden v. Preston, 11 Bush, 191; McEvers v. Steamboat, 22 Mo. 189.

<sup>1</sup> Crosby v. Fitch, 12 Conn. 410; Bowman v. Teall, 23 Wend. 306; Swetland v. R. R., 102 Mass. 276.

<sup>2</sup> McPadden v. R. R., 44 N. Y. 478.

<sup>3</sup> Williams v. Grant, 1 Conn. 487.

<sup>4</sup> Siordet v. Hall, 4 Bing. 607; 1 M. & P. 561.

<sup>5</sup> Wing v. R. R., 1 Hilton, 235.

<sup>6</sup> See other cases in Wh. on Neg. § 559.

<sup>7</sup> See Leake, 2d ed. 697; Jones v. St. John's College, L. R. 6 Q. B. 115; School Dist. v. Dauchy, 25 Conn. 530; Tompkins v. Dudley, 25 N. Y. 272; Baker v. Johnson, 42 N. Y. 126; Clancy v. Overman, 1 Dev. & B. 402.

<sup>8</sup> Thiis v. Byers, L. R. 1 Q. B. D. 244.

<sup>9</sup> Kearon v. Pearson, 7 H. & N. 386.

<sup>10</sup> Adams v. Nichols, 19 Pick. 275.

self on the ground that there was an accumulation of unforeseen difficulties in his way which either absolutely prevented his performance of his contract, or made its performance possible only at a ruinous sacrifice.<sup>1</sup> And where a freighter undertakes specifically that he will not detain a ship beyond a designated period, he becomes liable for damages, although the delay may have been caused by events beyond his control and without any fault.<sup>2</sup> And a contractor cannot set up as a defence to a suit on his contract to have a particular building ready at a particular time, that it was destroyed when near completion by lightning.<sup>3</sup> "The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party."<sup>4</sup> This is eminently the case in contracts where there is a deliberate election to take certain risks,<sup>5</sup> as in insurance cases;<sup>6</sup> and in charter parties and contracts of car-

<sup>1</sup> *Bullock v. Dommit*, 6 T. R. 650; *Atkinson v. Ritchie*, 10 East, 530; *Thorn v. City of London*, L. R. 1 Ap. Ca. 120; *Jones v. U. S.*, 96 U. S. 24; *Dermott v. Jones*, 2 Wall. 1; *Gilpins v. Consequa*, Pet. C. C. 86; *Eddy v. Clement*, 38 Vt. 486; *Adams v. Nichols*, 19 Pick. 275; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Bigelow v. Collamore*, 5 Cush. 231; *Lord v. Wheeler*, 1 Gray, 282; *Kramer v. Cook*, 7 Gray, 550; *Wareham Bk. v. Burt*, 5 Allen, 113; *Wells v. Calnan*, 107 Mass. 514; *Thomas v. Knowles*, 128 Mass. 22; *Beebe v. Johnson*, 19 Wend. 500; *Harmony v. Bingham*, 2 Kern, 107; *Tompkins v. Dudley*, 25 N. Y. 275; *Dexter v. Norton*, 47 N. Y. 62; *Booth v. Mill Co.*, 60 N. Y. 489; *Kemp v. Ice Co.*, 69 N. Y. 45; *Wheeler v. Ins. Co.*, 82 N. Y. 543; *School Trustees v. Bennett*, 3 Dutch. 515; *Anspach v. Bast*, 52 Penn. St. 356; *Lovering v. Coal Co.*, 54 Penn. St. 291; *Peterson v. Edmonson*, 5 Harring. 378; *Kribs v. Jones*, 44 Md. 396; *Linn v. Ross*, 10

Ohio, 412; *Wood v. Long*, 28 Ind. 314; *Brumby v. Smith*, 3 Ala. 123; *Davis v. Smith*, 15 Mo. 467; *Duncan v. Gibson*, 45 Mo. 352; *Wilson v. Knott*, 3 Humph. 473; *Peck v. Ledwidge*, 25 Ill. 112; and see cases cited *Wald's Pollock*, 356; and *infra*, § 321.

<sup>2</sup> *Randall v. Lynch*, 2 Camp. 352; 12 East, 179; *Thiis v. Byers*, L. R. 1 Q. B. D. 249; *Straker v. Kidd*, L. R. 3 Q. B. D. 223.

<sup>3</sup> *School District v. Dauchy*, 25 Conn. 530.

<sup>4</sup> *Ibid.*, per Ellsworth, J.; see limitations, *infra*, §§ 314 *et seq.*

<sup>5</sup> *Castle v. Playford*, L. R. 7 Ex. 98; *Martineau v. Kitching*, L. R. 7 Q. B. 436.

<sup>6</sup> *Brown v. Ins. Co.*, 1 E. & E. 853; *Medeiros v. Hill*, 8 Bing. 231; *Tufnell v. Constable*, 7 Ad. & El. 798; *Adams v. Nichols*, 19 Pick. 275; *Baker v. Ins. Co.*, 12 Gray, 603; *Brown v. Kimball*, 12 Vt. 617; *Martin v. Schoenberger*, 8 W. & S. 367. As to guarantees, see *infra*, § 311.



riage;<sup>1</sup> and when the promisor by due diligence could have made himself acquainted with a defect in the materials which he was to use which made performance impossible, this impossibility is no defence.<sup>2</sup>—"Where a party has either expressly or impliedly undertaken without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control."<sup>3</sup>—Another illustration of the principle before us may be found in a case decided in Michigan in 1880. S. agreed to locate and enter pine lands in the name of A. & P. to an amount not exceeding 10,000 acres, they to pay him expenses, and to convey to him an undivided fifth in the land located and entered. The panic of 1873 intervening, A. & P. were

<sup>1</sup> Leake, 2d ed. 697; Shubrick v. Salmond, 3 Burr. 1637; Kearon v. Pearson, 7 H. & N. 386; Jones v. Adamson, L. R. 1 Ex. D. 60; and cases cited, Wh. on Neg. § 550; *infra*, § 317.

<sup>2</sup> Dermott v. Jones, 2 Wall. 1; see Hills v. Sughrue, 15 M. & W. 253. In Thorn v. Mayor of London, L. R. 9 Ex. 163; L. R. 10 Ex. 112; L. R. 1 App. Cas. (H. of L.) 120, the engineer of the city of London prepared certain specifications in a contract which the plaintiff undertook to execute, but which, when the work was in the course of performance, were found to contain impracticable conditions. The contractor sued the city for the loss he had incurred in his attempt to fill what turned out to be an impossible undertaking, but it was held, both in the Exchequer Chamber and the House of Lords, that the risk was one which he himself assumed.

In Bailey v. De Crespigny, L. R. 4 Q. B. 185, the court said: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages

for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated or guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." See, further, White v. Mann, 26 Me. 361; Lord v. Wheeler, 1 Gray, 282; Carpenter v. Stevens, 12 Wend. 589; Harmony v. Bingham, 2 Kernan, 106; Scully v. Kirkpatrick, 79 Penn. St. 324; Clark v. Franklin, 7 Leigh, 1; Brumby v. Smith, 3 Ala. 123.

<sup>3</sup> Per cur. Ford v. Cotesworth, L. R. 4 Q. B. 134; Leake, 2d ed. 693. To same effect is Harmony v. Bingham, 2 Kernan, 106.

unable to furnish funds. It was held that the panic was a risk they took, and was no defence to them when sued on their contract.<sup>1</sup>—Insanity of the insured, by which payment of premiums is dropped, does not prevent the forfeiture of the policy conditioned on such payment.<sup>2</sup>—It should also be remembered, as we will see hereafter, that personal *casus* is no excuse when the condition can be performed by a substitute or an attorney.<sup>3</sup>

§ 312. A party to a contract, who, by his own action, interposes an insuperable bar in the way of the performance of the contract by the other party, cannot claim damages for such non-performance. The promisor, in other words, is excused to the extent in which performance is made impossible by the promisee.<sup>4</sup> The same rule applies where the obligor of a bond makes the performance of its condition impossible;<sup>5</sup> and where an employer interferes so as to prevent the performance of his work by the contractor;<sup>6</sup> and where an author is prevented from contributing to a periodical by the abandonment of the periodical by the publisher.<sup>7</sup> “It is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract; and it appears sufficient if the contract cannot be performed in the manner stipulated, though it may be performed in some other

<sup>1</sup> *McCreery v. Green*, 38 Mich. 172.

<sup>2</sup> *Wheeler v. Ins. Co.*, 82 N. Y. 547.

<sup>3</sup> *Infra*, § 323; *Wolf v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40; *Wheeler v. Ins. Co.*, 82 N. Y. 547.

<sup>4</sup> *Infra*, §§ 603, 712; *Wald's Pollock*, *ut supra*, 371, and cases there cited; *Arthur v. Wynne*, L. R. 14 Ch. D. 603; *Roberts v. Bury Com.*, L. R. 4 C. P. 755; 5 C. P. 310; *Giles v. Edward*, 7 T. R. 181; *Holme v. Guppy*, 3 M. & W. 387; *Ellis v. Hamlen*, 3 Taunt. 53; *Raymond v. Minton*, L. R. 1 Ex. 244; *Clearwater v. Meredith*, 1 Wall. 25; *Johnston v. Caulkins*, 1 Johns. Cas.

116; *Hurd v. Gill*, 45 N. Y. 341;

*Stewart v. Keteltas*, 36 N. Y. 388;

*Tone v. Doelger*, 6 Rob. (N. Y.) 251;

*Johnson v. Somerville*, 33 N. J. L. 152;

*Kline v. Culter*, 34 N. J. Eq. 329;

*Navigation Co. v. Wilcox*, 7 Jones L.

481; *Tewksbury v. O'Connell*, 21 Cal.

60; *Reynolds v. R. R.*, 11 Neb. 186;

and cases cited *infra*, §§ 716-747, 901.

<sup>5</sup> *Boswick v. Swindells*, 3 A. & E.

881; *Pindar v. Upton*, 44 N. H. 358;

*Tasker v. Bartlett*, 5 Cush. 359.

<sup>6</sup> *Thornhill v. Neats*, 8 C. B. N. S.

831.

<sup>7</sup> *Planché v. Colburn*, 8 Bing. 14;

*Leake*, 2d ed. 65 709.

manner not very different."<sup>1</sup> And, as a general rule, a performance conditioned on an impossibility created by the other side cannot be compelled.<sup>2</sup>

§ 313. The rule *casus non praestantur*, according to Momm-  
sen,<sup>3</sup> is to be considered as prescribing that, in cases of casual impossibility (casuellen Unmöglichkeit), the promisor shall not be liable in damages. But the impossibility must be commensurate with the duty. Where the impossibility is only partial, it relieves from liability only *pro tanto*.<sup>4</sup> The questions, what abatement of price is to be made in cases of partial performance, and whether in such cases the contract can be rescinded, are elsewhere distinctively discussed.<sup>5</sup> As a rule, fractional impossibility only abates *pro tanto*.<sup>6</sup> To make casual impossibility in such cases a ground for release *in toto*, it must go to the whole claim. It must also be permanent. It is true that to its permanency it is not essential that there should be absolutely no prospect of its future removal. But if the impediment be of a continuous character, then, as has been already shown in reference to continuous impediments existing at the time of the contract, it vacates the contract; nor can such a contract be subsequently, at some remote period, called into activity by the removal of an impediment of an apparently permanent type. Whether, when the impediment is temporary, this vacates the contract, depends upon whether the performance of the contract falls within the time during which the impediment exists. If it does, the impediment is regarded in the same light as a permanent impossibility.<sup>7</sup> But when the performance is not limited to be within this specified period, its efficacy is not affected by the temporary impediment.<sup>8</sup>

Casual impossibility must be permanent and absolute.

<sup>1</sup> Mellish, L. J., *Panama Tel. Co. v. India Rubber Telegraph Works*, L. R. 10 Ch. 532, citing *Planché v. Colburn*, 8 Bing. 14; *Leake*, 2d ed. 708.

<sup>2</sup> *Infra*, § 547; and see *infra*, §§ 603-4, 716, 747, 901.

<sup>3</sup> *Op. cit.* § 25, p. 286.

<sup>4</sup> *Infra*, § 899; L. 40, § 1, D. de

cond. indeb. (12, 6); L. 21, D. de hered. vend. (18, 4).

<sup>5</sup> *Infra*, §§ 580, 899.

<sup>6</sup> *Infra*, § 330.

<sup>7</sup> L. 9, § 4, L. 133, 34, D. locati (19, 2).

<sup>8</sup> See *supra*, §§ 298 *et seq.*

§ 314. If by a *casus* which involves no culpability or guarantee in a party contracting to deliver a thing, such thing has ceased to exist, the contract falls. Thus in a case already noticed, where the proprietor of a music hall agreed to let the plaintiff have the use of it for concerts on certain days, it was held that the destruction of the hall by fire was a defence to a suit for breach of contract.<sup>1</sup> A contract, also, for the delivery of a certain quantity out of a specific crop of potatoes is *pro tanto* avoided by a failure of the crop, so that the specified quantity is not produced.<sup>2</sup> But, as we have seen, such impossibility is no defence to a suit on a contract to do a specific thing, unless all things of that class are made impossible.<sup>3</sup> Thus, it is no defence to a suit to build a house, that the house when building was burned, though it would be otherwise if by *casus* or *vis major*, the building of all houses in that place was made impossible.<sup>4</sup>—Vangerow<sup>5</sup> takes the following positions:—

I. When a casual impossibility occurs without any fault of the debtor, then the creditor bears the loss (*res creditoris periculo est, res creditori perit*); nor can he claim damages, or even recover back what he has paid. On the other hand, the debtor bears the loss (*res debitoris periculo est, res debitori perit*) when in cases of casual impossibility he has guaranteed the risk, or has in any way provoked it. As we have seen, the same distinction obtains in our own law.<sup>6</sup>

II. Various attempts have been made to reduce the rules relating to *periculum* to a leading principle, but without success. By many of the older authorities the maxim *casum sentit dominus* is invoked; but this maxim, even in its widest acceptation, can be only understood to mean that a claimant loses his claim on the destruction of the thing from which it

<sup>1</sup> Taylor v. Caldwell, 3 B. & S. 826; 70 Ill. 527. See, also, Lord v. Wheeler, *supra*, § 300.

<sup>2</sup> Howell v. Coupland, L. R. 1 Q. B. 25; and cases cited *supra*, § 300.

D. 258; *supra*, § 290; *infra*, § 330. To the same point Mr. Wald, in his notes to Pollock on Cont. p. 362, cites Wells v. Calnan, 107 Mass. 514; School Dist. v. Dauchy, 25 Conn. 530; Dexter v. Norton, 47 N. Y. 62; Walker v. Tucker, 70 Ill. 527.

<sup>3</sup> *Supra*, § 313; *infra*, § 330.

<sup>4</sup> Adams v. Nichols, 19 Pick. 275; *supra*, § 311.

<sup>5</sup> Pandekt. iii. § 591.

<sup>6</sup> *Supra*, § 311.

springs, and cannot be stretched so as to determine the influence that the destruction of the *res debita* has on an obligation. In fact, the champions of this maxim are obliged to subject it to so many restrictions and exceptions that little of it remains.—Wächter and others fall back upon the maxims *impossibilium nulla obligatio est*,<sup>1</sup> and *casus a nullo praestantur*;<sup>2</sup> but, in reply, it may be said (1) that these maxims are negative, and, therefore, not adapted to the decision of the question before us; and (2), that while they affirm the debtor's liberation in case of the casual destruction of the thing from which the obligation flows, they do not determine how far in such cases the creditor continues bound.—Madai lays it down as a rule that the party to whom performance is possible must perform, but that the party whose performance becomes impossible is freed from liability. Vangerow replies that while this principle is not incorrect in respect to those obligations which relate to the delivery of a thing, it leads in other cases (*e. g.*, in the *locatio conductio*) to erroneous results, and cannot be, therefore, accepted as giving a universal rule. Koch, Fuchs, and others adopt, as decisive, the rule that when performance becomes impossible without the promisor's fault, then the obligation may by fiction be regarded as fulfilled. But, according to Vangerow, the proof passages adduced do not sustain this view, and the solution itself does not reach many important bailments. Vangerow, therefore, holds that no common rule for determining necessity in all cases can be found, but that each case depends upon the terms of the particular class of obligations to which it belongs.

III. In unilateral obligations the rule is that with the casual destruction of the object the obligation falls, and, therefore, in such cases the creditor takes the loss.<sup>3</sup>

<sup>1</sup> L. 185, de R. J.

<sup>2</sup> L. 23, fin. eod.

<sup>3</sup> He cites to this point L. 107, de solut. (46, 3), where Pomponius says: "Verborum obligatio . . . resolvitur naturaliter veluti solutione, aut quum res in stipulationen deducta sine culpa promissoris in rebus humanis esse desiit." Other passages to the same

effect are also noticed. From the nature of the case, however, this rule only applies in cases where a specific thing is the object of the obligation. When the description is by quantity or *genus*, then the debtor is not liberated by the casual destruction of the *res debita*, *quia genus non perit*.

IV. With regard to bilateral obligations for the transfer of things, a party who without fault or guarantee is prevented from fulfilling his contract by the casual destruction of the goods, is entirely freed from the duty. Whether the other party continues bound is the subject of conflicting opinion.

(1.) In contracts of sale the rule is repeatedly given in the Roman standards, that as soon as the contract is completed the risk passes to the purchaser, and that, therefore, when the goods are casually destroyed, the purchaser is bound to pay their price.

(2.) The same rule applies to what are technically called innominat-contracts. Vangerow concludes that as contracts for sale and innominat-contracts are almost the only bilateral contracts for the transfer of things, the rule before us may be regarded as of general application. It rests, he argues, on a sound reason. If both obligations entering into such a contract are fulfilled on both sides, then, when after delivery the thing is accidentally destroyed or injured, the loss is to fall on the receiver; *and that which is right in cases of immediate delivery, remains right in cases in which delivery is rightfully excused*, the more so because from the time of the completion of the contract the promisee has the disposal of the thing. If, however, the delivery of the goods is negligently delayed, then the vendor has to take the risk.

V. The rules above stated are modified in cases in which a sale is conditional. If the condition has not taken effect, the transaction is still open, and a casual loss falls on the promisor. If the condition is complied with, the loss falls on the promisee.<sup>1</sup> When, however, the accident to the *res debita* occurs while the condition is still pending, a distinction is to be made between *periculum interitus*, and *periculum deteriorationis*. If the *res debita* ceases to exist during the pendency of the condition, then the contract is on both sides released. If *after* the *casus* the condition ceases to operate, then the obligation

<sup>1</sup> "Quodsi sub conditione res venierit, si quidem defecerit conditio, nulla est emptio, sicuti nec stipulatio; quodsi extiterit, Proculus et Octavenus em-

toris esse periculum ajunt; idem Pomponius libro nono probat." L. 8, de per. et comm. rei vend.

can never be perfect, since, when on its face it becomes operative, it has no object on which to act.

§ 315. An agreement to deliver fungible articles, *e. g.* gold, is not released by the loss of such articles by the party so agreeing. No matter what calamity may overtake him, or how completely he may be stripped of his possessions, he continues bound. Even when he designates the coin he has to deliver, the conclusion, according to the Roman law, is the same. There may be even no coin of the stamp specified any longer in existence; but this would not relieve him, if the coin was designated by him as representing a certain amount of money. It would be otherwise if the coin was to be delivered as a curiosity, or as a specific article of distinct value.<sup>1</sup> An illustration of the rule before us is to be found in a recent English case already cited. V. agreed in March to sell to P. 200 tons of potatoes, to be grown on certain designated land of V. In consequence of the potato blight, V. was able to deliver only 80 tons, that being the sole produce of the land in question. It was held that he was only bound to this amount, though it would have been otherwise had he agreed to deliver 200 tons of potatoes without this restriction.—“The contract was for 200 tons of a particular crop in particular fields” . . . “not 200 tons of potatoes simply, but 200 tons off particular land,” . . . “and therefore there was an implied term in the contract that each party should be free if the crop perished.”<sup>2</sup>

But not of  
fungible  
things.

<sup>1</sup> Mommsen, *op. cit.*, 50; Lloyd v. Guibert, L. R. 1 Q. B. 121; Youqua v. Nixon, Pet. C. C. 221; Gilpins v. Consequa, Pet. C. C. 91; Lovering v. Coal Co., 54 Penn. St. 291.

<sup>2</sup> Howell v. Coupland, L. R. 9 Q. B. 462; aff. on app., 1 Q. B. D. 258; as cited and adopted in Pollock on Cont. Wald's ed. 364-5; *supra*, § 314; *infra*, § 330. By some of the old jurists it was maintained that in all contracts the clause *rebus sic stantibus* or *si res maneat quo sunt loco*, was tacitly understood; and that all contracts, therefore, were conditioned upon the continuance

of the material facts on which they were based. Eberhard, Abhand. von der Klausel, *rebus sic stantibus*, in dessen Beiträgen zur Erläuterung der Deutschen Rechte, Th. I. S. 1; Barbosa, thesaur. Lib. XIV. cap. I. ax. 14; Cocceji, de clausula, *rebus sic stantibus*, Tom. I. disp. 15; Koch, Forder. § 137, II. 506. That the maxim cannot be maintained as a general rule is shown by Grotius, de jure belli ac pacis, Lib. II. cap. 16, § 24, and more recently by Weber, Systematische Entwicklung der Lehre von der natürlichen Verbindlichkeit, § 90; and it is repu-

§ 316. When the delivery of a specific article is undertaken (there being no absolute guarantee to deliver), this is dependent on the power of the contracting party to deliver the article. If it has been without his fault withdrawn from his control after the promise was made, this is a defence. This, in the Roman law, has been held to apply to the carrying off of goods by robbery, theft, and embezzlement.<sup>1</sup> It applies, also, to cases where from some unforeseen cause, amounting to *casus*, the specific article, though there had been every reason to expect it, could not be obtained by the vendor at the time of the proposed delivery.<sup>2</sup> —This rule, however, does not, as we have seen, apply to fungible articles. All the wheat a party may have on hand at the time of a contract to deliver a certain amount of wheat, may be destroyed by *casus*. This does not excuse him from his contract. Wheat can be procured elsewhere, and it must be procured.<sup>3</sup>

§ 317. The rule of the Roman law, that if a sale is completed, the loss, in case of destruction, falls on the purchaser (there being no blame on either side) although there has been no delivery, has been much criticized, and various efforts made to reconcile it with the position that in contracts of hiring the lessee is excused *pro tanto* by the destruction of the thing hired. The older jurists held fast to the maxim *casum sentit dominus*, to which they regarded the Roman rule as to sale as an anomalous exception. —By some the exception was based on the rule *debitor speciei*

diated as such by later German authorities and codes. Koch, Ford. *ut supra*. According to Weber, the clause *rebus sic stantibus* is only to be implied in cases where by either the nature of the contract or its express terms the contract would be inoperative without such assumption. In the German Landrecht, § 378, the rule is thus stated: When by such unforeseen change of circumstances it becomes impossible to perform the contract on either side, then

either party may rescind. In this case rescission is permissible without either party having a right to damages. As to the conditioning of performance on delivery, see *infra*, § 579.

<sup>1</sup> Mommsen, *op. cit.* 30.

<sup>2</sup> Howell v. Coupland, L. R. 9 Q. B. 462; S. C. aff. in Ct. of Ap., 1 Q. B. D. 258; and other cases cited *supra*, §§ 300–315.

<sup>3</sup> See *supra*, § 315.



*liberatur interitu rei.*<sup>1</sup> More recently the rule governing sales has been declared to be founded on reason, that governing leases being exceptional.<sup>2</sup> The reason given is that only the delivery, not the payment, becomes impossible, and that the latter, therefore, remains due. Others base the Roman doctrine of sale on the fiction of a performance. Mommsen repudiates the first of these views on the ground that the obligation of payment is dependent on the performance of the obligation of delivery.—He explains, however, the distinctive Roman ruling as to sales on the ground that when a sale is complete, there is nothing in the way of immediate performance. The obligation, therefore, could be regarded as actually performed, supposing that the delay in delivery is not imputable to misconduct of the vendor. This, however, is not the case with incomplete sales and with hiring.—An incomplete sale cannot be spoken of as so consummated that the property passes to the purchaser. When goods are hired out, also, it is for a continuous period in which the obligation of the lessee is from time to time renewed; an instantaneous performance of the contract is impossible from the necessity of the case. It follows that the rule governing complete contracts of sale (that impossibility of delivery based on *casus* is equivalent to a performance of the contract) cannot have the general application claimed for it. It is, indeed, not limited to contracts for sale. But it assumes as conditions precedent (1) that there is no incompleteness or condition in the obligation; and (2), that there is nothing in the transaction forbidding immediate delivery. If either of these conditions fail, the fiction of delivery also fails, and with it fails the duty of payment. By Vangerow, as we have already seen, the rule is based on the reason that if the purchaser bears the loss when the goods have been delivered, he should bear it when delivery is prevented by causes for which the law does not hold the vendor responsible; and this view is strengthened by the fact that from the time when the sale is completed, though before delivery, the vendee has the disposal of the goods.<sup>3</sup> In our own law the same result is

<sup>1</sup> Voet. comm. ad. tit. periculo, M. 1, Pothier, *Traité de la vente*, § 307; cited by Mommsen, *op. cit.* 346. Molitor, *les Obligations*, i. § 282.

<sup>2</sup> Wächter, *Archiv. civ. Pr.* xv. 189; <sup>3</sup> *Supra*, § 314.

reached by the position that when by the terms of a contract the goods are to be deposited in a particular place, or given to a particular carrier (and unless there be some immediate disposal of the custody of the goods the contract cannot be regarded as complete), there is a constructive delivery.<sup>1</sup>—By our own

<sup>1</sup> See Wh. Con. of L. § 417.

Where the defendant had a horse on trial, with the right to return in eight days if not satisfied, and the horse died on the third day without the fault of either party, it was held that the plaintiff, being the vendor, could not recover the price. *Elphick v. Barnes*, L. R. 5 C. P. D. 321.

On the topic in the text the following observations by Mommsen are worthy of study: In the Roman law, if destruction by *casus* occurs after the sale of the thing, not only is the vendor relieved from delivering the thing, but may recover not only the price, but the expenses he had been at in relation to the thing after the sale. *Cf. Mackenzie, Rom. Law*, 221. Thus the vendor of a slave, which before tradition has died without fault of the vendor, may recover from the purchaser the price of the burial of the slave. L. 13, § 22, D. de act. empti. (19, 1). Mommsen cites a series of passages in which it is ruled that the purchaser is bound to pay the price when the thing sold cannot be delivered through causes for which the vendor is not to blame.—It is frequently ruled, so he declares (*op. cit.* 330), that, if the sale is perfected, the purchaser takes the risk (*periculum*); and that under such circumstances the purchaser can obtain no indemnity, but must pay the price.—This rule applies *a fortiori* in cases where the thing is only partially destroyed.

It is otherwise, however, with an imperfect sale—imperfecten Kaufcontract. In this case, it is true, if there

be an impossibility based on *casus*, no damages can be claimed from the vendor; but, on the other hand, the purchaser also is freed from his obligation. As cases of imperfect sales are enumerated the following:—

1. *Conditional sale.* As long as the condition is not complied with, the risk is on the vendor. If performance becomes, without the fault of the vendor, impossible before the condition is satisfied, the contract is void, and the purchaser is not bound. L. 8, pr. D. de peric. et comm. (18, 6). The same rule is applied in cases of partial impossibility, and of temporary impossibility, even when the impossibility rests on the quality of the things to be delivered. It is true that it is ruled that the purchaser must take the risk of a depreciation of value which occurred without the vendor's fault, and that he must pay the entire purchase-money when the goods at the time of the occurrence of the condition could be delivered to their full superficial extent, but had intermediately suffered a deterioration. This, however, is to be limited to cases in which the quality of the goods at the time of the obligation does not expressly enter into the contract. There is, therefore, here no contradiction with the rules above given, since the deterioration of the goods creates only a partial impossibility of performance in cases where the contract designates the quality.

2. *Imperfect contract in reference to the price.* As long as the price is unsettled, the sale is imperfect. A case specifically mentioned is that where

law, the risk of *casus*, after a sale is completed, falls on the purchaser.<sup>1</sup> "When the terms of the sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute without payment or delivery, and the property and risk of accident to the goods vest in the buyer."<sup>2</sup> "In an actual sale," so is the rule stated by Mr. Benjamin,<sup>3</sup> "the property passes, and the risk of loss is in the purchaser, while in the agreement to sell, or executory contract, the risk remains in the vendor." "Generally," so it is said by Bayley,

the price is made dependent upon the quantity of the goods sold. If the *casus* intervenes before measurement, the vendor bears the loss, and has no claim against the purchaser. L. 35, §§ 5, 6, D. de contr. emp. (18, 1). But the purchaser bears the risk of depreciation.

3. *Imperfect sale in reference to the goods.* Under this head, Mommsen (op. cit. 339) specifies the following:—

(a) *Sale of a res futura.* In this case the perfecting of the contract depends upon the thing coming into existence, on which event all the incidents of perfect sales are to be assigned. It follows, therefore, that when the thing, without the vendor's fault, does not come into existence, there is no binding obligation, and consequently no claim against the purchaser.

(b) *Sale of a genus.* If the article is designated only by its class, and that class unlimited, objective impossibility cannot be set up. It is otherwise when the class is limited, as when wine is sold of a particular vintage. In such case, when none of the class is obtainable, all being destroyed subsequently to the contract, and this without the vendor's fault, then, if the question be considered on principle, the loss falls on the purchaser. We have, however, rulings of the Roman jurists to the effect that when a certain quantity of

wine is sold, out of a particular cask, the vendor takes the risk down to the time of the measurement of the wine. L. 35, § 7, D. de contr. emp. (18, 1); L. 5, D. de periculo (18, 6). While the Romans, therefore, so comments Mommsen (op. cit. 344), regarded the alternative obligation as unconditioned and therefore perfect, they held the *obligatio generis* to be conditioned on the due separation of the object to be delivered from the class to which it belonged; and they applied, therefore, to the sale of a *genus* the principles adopted in reference to conditional sales, so that the risk does not attach to the purchaser until the measurement. But the purchaser must bear the risk of deterioration falling on the particular class. The deterioration, however, must be of *all* that class. Thus, if two pipes of a wine in a particular cellar are sold, the purchaser does not bear the risk when only one or more of the casks of this wine are injured, so long as the injury does not extend to other casks.

<sup>1</sup> *Adams v. Lindsell*, 1 B. & Ald. 681; *Mactier v. Frith*, 6 Wend. 103; *Phillips v. Moor*, 71 Me. 78.

<sup>2</sup> *Kent's Com.* ii. 492, adopted *Wing v. Clarke*, 24 Me. 366; *Phillips v. Moor*, 71 Me. 81.

<sup>3</sup> *Sales, etc.*, 3d Am. ed. § 78.

J.,<sup>1</sup> “where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the *property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price.”<sup>2</sup>

§ 318. Whether a covenant of a tenant is vacated by his ejection by a public enemy, will be hereafter considered.<sup>3</sup> We have in this section to consider, who, in case of loss by either fire or hurricane, is to bear the burden? Land is leased with buildings on it on a covenant to pay rent. The buildings are burned, and the tenant loses the use. There is a hardship either way: either the landlord or the tenant must bear the burden. Now on a lease of land, with an express covenant to pay rent, with no provision as to the party on whom the repairs are to fall, there can be little question that the tenant takes the risk of fire. In any view, he enjoys the land; and if he has not insured, and has not taken such precautions as preclude fire, it is his misfortune, but the loss must fall on him.<sup>4</sup> “When the law creates a duty,” so is the rule stated on high authority, “and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse it, as in waste, if a house be destroyed by tempest or by enemies, the lessee is excused; so in escape, if a prison be destroyed by tempest or enemies, the jailer is excused; but when the party by his own contract creates a duty or charge upon himself,

<sup>1</sup> *Simmons v. Swift*, 5 B. & C. 862, adopted in *Benj. on Sales*, 3d Am. ed. § 315, citing *Arnold v. Delano*, 4 Cush. 33; *Willis v. Willis*, 6 Dana, 48; *Hall v. Richardson*, 16 Md. 396.

<sup>2</sup> See to same effect, *Park, J.*, in *Dixon v. Yates*, 5 B. & Ad. 313, and numerous cases cited in *Benj. 3d Am. ed. § 315*. The risk attends the title. *Rugg v. Minott*, 11 East, 210; *Thayer v. Lapham*, 13 Allen, 26; *Joyce v. Adams*, 4 Seld. 296; *Terry v. Wheeler*, 25 N. Y. 520; *Whitcomb v. Whitney*, 24 Mich. 480; *Willis v. Willis*, 6 Dana, 49.

<sup>3</sup> See *infra*, § 319, and see *Paradine v. Jane*, Ayleyn, 26; *Harmony v. Bingham*, 12 N. Y. 99; *Bayly v. Lawrence*, 1 Bay, 499.

<sup>4</sup> *Smith's Land. and Tenant*, 202; *Loft v. Dennis*, 1 E. & E. 478; *Leeds v. Cheetham*, 1 Sim. 146; *Fowler v. Bott*, 6 Mass. 63; *Hallett v. Wylie*, 3 Johns. 44; *Gates v. Green*, 4 Paige, 355; *Harmony v. Bingham*, 12 N. Y. 99; *Calloway v. Hamby*, 65 N. C. 631; *Dowdy v. McLellan*, 52 Ga. 408; *Ely v. Ely*, 80 Ill. 532; and other cases cited, *Wald's Pollock*, 358; *Bisph. Eq.* 175.

he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he is bound to repair it."<sup>1</sup> Hence, when there is an express covenant to keep in repair, destruction of premises by *casus* is no defence to a suit on the covenant.<sup>2</sup> Even a covenant to rebuild a bridge is not excused by destruction caused by extraordinary storms.<sup>3</sup> It is no defence, also, to an action for rent that the premises had been destroyed by fire, and that the landlord had recovered the insurance money.<sup>4</sup> On the other hand, where simply a building is let on a short lease, the lessee having no right over the soil, and being subjected to no duty to repair, he is not bound for rent after the building is destroyed by a fire for which he is in no way responsible.<sup>5</sup> The reason is, that in the first contract the implication is that it is the land which the lessee takes, and of which he must bear the burdens as well as the benefits, while in the second, he takes only the building, and when that is gone, possesses nothing which is of any value to him. Special minor covenants, also, dependent on the continuance of the building may be defeated on the destruction of the building.<sup>6</sup> Hence, a lessee of coal mines, covenanting to work them during a stated period, is relieved from his covenant by

<sup>1</sup> Williams, Serg., 2 Saund. 69; Fisher v. Milliken, 8 Barr, 121; Dyer adopted in Hoy v. Holt, 91 Penn. St. 91. v. Wightman, 66 Penn. St. 427; Bussman v. Ganster, 72 Penn. St. 285.

<sup>2</sup> Bullock v. Dommitt, 6 T. R. 650; Leeds v. Cheetham, 1 Sim. 146; Digby v. Atkinson, 4 Camp. 475; Darrell v. Tibbetts, L. R. 5 Q. B. D. 560; Phillips v. Stevens, 16 Mass. 238; Hoy v. Holt, 91 Penn. St. 88; Moyer v. Mitchell, 53 Md. 171; Linn v. Rose, 10 Ohio, 412; Ely v. Ely, 80 Ill. 532. In Whitaker v. Hawley, 25 Kan. 674, it is doubted whether the common law on this point is in force in Kansas. <sup>5</sup> Stockwell v. Hunter, 11 Mete. 448 (a lease of a cellar); Shawmut Bank v. Boston, 118 Mass. 125; Graves v. Berdan, 26 N. Y. 498 (a lease of upper rooms); Kerr v. Exchange Co., 3 Edw. 315 (a lease of rooms in a merchant's exchange); Winton v. Cornish, 5 Ohio, 477 (a lease of cellar and store-room); Bayly v. Lawrence, 1 Bay, 499; McMillan v. Solomon, 42 Ala. 356.

<sup>3</sup> Brecknock Co. v. Pritchard, 6 T. R. 750. <sup>6</sup> Pollock, *op. cit.* 359.

<sup>4</sup> Magaw v. Lambert, 3 Barr, 144;

the exhaustion of the mines before the expiration of the period assigned.<sup>1</sup>—It has also been held in Indiana, that where, after a lease of a saw-mill and one room of an adjoining factory, both factory and saw-mill were destroyed by fire, the tenant was relieved from the rent of the room, but not from the rent of the saw-mill.<sup>2</sup> And in Kansas, where the existence of the common law rule as above stated is questioned, it is held that where real and personal property are leased in a gross amount in a single contract, and where both are destroyed by *casus*, the tenant is entitled to an apportionment of the rent.<sup>3</sup>—Unless the covenant to repair is express, the tenant is not bound to repair in case of destruction by *casus*; and no such duty, it has been held, is imposed on the tenant by a mere covenant to restore to the lessor the property in the same condition as when taken.<sup>4</sup>

<sup>1</sup> *Walker v. Tucker*, 70 Ill. 527; see *Clifford v. Watts*, L. R. 5 C. P. 577. That where a building is let for a special purpose, destruction may be a defence, see *supra*, § 300. As to non-existence of thing contracted for, see generally, *supra*, § 298.

<sup>2</sup> *Womack v. McQuarry*, 28 Ind. 103. It was said by the court: "This exception applies only to cases where the demise is of part of an entire building, as a cellar or upper room; and it is founded upon the idea that in such cases it is not the intention of the lease to grant any interest in the land, save for the single purpose of the enjoyment of the apartment devised, and when that enjoyment becomes impossible by the destruction of the building, there remains nothing upon which the demise can operate." See article in 24 Alb. L. J. 364.

<sup>3</sup> *Whitaker v. Hawley*, 25 Kan. 674.

<sup>4</sup> *Warner v. Hutchins*, 5 Barb. 666; *Maggort v. Hansbarger*, 8 Leigh, 536; *Graham v. Swearingen*, 9 Yerg. 276; *Levey v. Dyess*, 51 Miss. 501; *Howeth v. Anderson*, 25 Fox, 557; *Miller v.*

*Morris*, 5 Tex. L. J. 113. In *Miller v. Morris*, *ut supra*, the court said: "In *Nave v. Berry*, 22 Ala. 390, the distinction was recognized and adopted between an obligation 'to repair and deliver up,' and one 'to deliver up.' That whilst the former binds the obligor to rebuild in case of loss by fire during the term, *Phillips v. Stevens*, 16 Mass. 238, the latter is construed to mean simply an obligation against holding over, and if the buildings are burned or destroyed, without the fault of the lessee, he is not bound to rebuild or pay for the improvements so destroyed. In *Maggort v. Hansbarger*, 8 Leigh, 536, the covenant was 'to return the said property with all its appurtenances.' The property was destroyed by fire. *Held*, that this was not a covenant to rebuild or to deliver the demised premises in good order, but simply a covenant or agreement to return the property with its appurtenances. A distinction was drawn between that case and *Ross v. Overton*, 3 Call, 309; *Phillips v. Stevens*, 16 Mass. 238; *Bullock v. Dommit*, 6 T. R. 650;

§ 319. To the rule that possession by a third party does not constitute impossibility, so as to extinguish liability, the Roman

Digly *c.* Atkinson, 4 Camp. 275, and others of like character, in which there was an express covenant to repair. The learned judge in delivering the opinion said, 'that even when there were such express covenants to repair, it has seemed to some a strained and doubtful construction to extend them to the case of rebuilding.' In *Wainscott v. Silvers*, 13 Ind. 500, the rule is stated, that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. That it is not sufficient to charge him that he agreed or covenanted to surrender the premises at the end of his term in the same repair or condition that they were in at the time of the contract. In *Warner v. Hitchins*, 5 Barb. 666, the covenant was to surrender up the possession of the premises, at the expiration of the lease, in the same condition they were in at the date of the lease, natural wear and tear excepted. The building was destroyed by fire. In an elaborate opinion, the leading cases in both England and this country were reviewed, and it was held that the covenant did not amount to one to repair, and that the tenants were not bound to rebuild. *McIntosh v. Lown*, 49 Barb. 554."

"The cases of leases of real and personal property are very rare. In *Bussman v. Ganster*, 72 Penn. St. 285, it is said, *obiter*: 'Even in the case of a lease of chattels with a house, where the chattels are all destroyed without any fault of the tenant, the better opinion seems to be that it affords no ground for defence *pro tanto*.' In *Fay v. Holloran*, 35 Barb. 295, it is said: 'Rent cannot be reserved out of chattels personal. If such chattels are

demised with land, at an entire rent, the rent issues out of the land only.' So in respect to a similar lease, it is held in *Jones v. Smith*, 14 Ohio, 606, that the rent cannot be apportioned between lessor and assignee; but this was where the assignment did not mention the personality. 'If the plaintiff recover, it is because the rent reserved is in respect to the land, and not increased by the personality.' To the same effect are *Sutliff v. Atwood*, 15 Ohio St. 186; *Farewell v. Dickenson*, 6 B. & C. 251.

"On this point the court in the principal case cite *Taverner's case*, 1 Dyer, 56, where the lease being of sheep and land, and the sheep died, the rent was apportioned, and conclude: 'Indeed, there would seem to be no just reason for denying apportionment, even though the common law doctrine in respect to leases of real estate be conceded. Mingling real and personal property in a single lease ought not to prevent the accepted rules concerning the hiring of each to be applied whenever application is possible.' " 24 Alb. L. J. 364.

In the Roman law the rule that the pay is to be apportioned to the occupation has application when the occupation becomes impossible in consequence of acts in any way imputable to the owner. L. 55, § 2, D. locati (19, 2.) . . . If the occupation is only partial, the lessee is not bound to pay the entire rent. Whether he has a right, in case of such partial eviction occurring through *casus*, to throw up the contract, depends on whether his occupation has been materially hindered. But mere trivial depreciations, though coming through *casus*, are not cause for abatement of rent; L. 27 pr. D. lo-

law recognizes an exception where the thing bargained for is in the possession of a public enemy. The reason is that in such case delivery is impossible, not merely to the person contracting, but to all other persons within the same jurisdiction.<sup>1</sup> But under our present system of international law, by which the right of suit is only suspended during war, and revives on peace,<sup>2</sup> the Roman rule in this respect must be viewed as modified. Impossibility cannot be predicated of an act which may be possible to-morrow.<sup>3</sup>—In England expulsion by a public enemy has been held no defence to an action for rent.<sup>4</sup> And it has been held in this country that an exception in a policy of insurance that no action shall be sustained unless begun within twelve months after loss, is not expanded by war between the countries of the contracting parties, so as to extend the right to sue till the close of the war.<sup>5</sup> But a lessee who was expelled by the military authorities, during the late civil war, from the leased estate, his lessor being in the insurgent territory, was held not liable for rent due for the period during which he was dispossessed.<sup>6</sup>—It is a defence to an action against a common carrier that the goods were seized by a public enemy, or by a pirate appearing in sufficient force to exact submission,<sup>7</sup> there being no negligence or default on either side. But if the ex-

cati (17, 2); *a fortiori* not of rescinding of contract. Temporary impossibility, so far as it excludes occupation, is, as long as it lasts, to be placed on the same footing as absolute impossibility, and when the exclusion is for a material length of time, the contract can be rescinded. Mommsen, *op. cit.* 344.

<sup>1</sup> L. 72, § 1. D. de contr. empt. (18, 1).

<sup>2</sup> *Infra*, § 473.

<sup>3</sup> Mommsen, *op. cit.* 16.

<sup>4</sup> *Paradine v. Jane*, Aleyne, 26. But see *Harrison v. Meyer*, 92 U. S. 111; *Bayley v. Lawrence*, 1 Bay, 499. That trading with public enemy is illegal during war, see *infra*, § 473.

<sup>5</sup> *Semmes v. Ins. Co.*, 13 Wall. 158.

<sup>6</sup> *Gates v. Goodloe*, 101 U. S. 612. As to effect of war in suspending remedy, see *supra*, § 305. *Pollard v. Schaffer*, 1 Dall. 210, rules that destruction of premises by a public enemy excused from contract to deliver up in good repair. See this case distinguished from destruction by fire in *Hoy v. Holt*, 91 Penn. St. 91.

<sup>7</sup> *Infra*, §§ 320, 329; *Magellan Pirates*, 18 Jur. 18; 25 Eng. L. & Eq. 595; *Hubbard v. Harnden's Ex.*, 10 R. I. 244; *Lewis v. Ludwick*, 6 Cold. 368; *Weakley v. Pearce*, 5 Heisk. 401; *Nashville, etc. R. R. v. Estis*, 7 Heisk. 622; *Sugarman v. State*, 28 Ark. 142.



posure to a public enemy was through the negligence of the party charged, *vis major* is no defence.<sup>1</sup>

§ 320. A bailee or other depositary of goods is not regarded as an insurer, but is responsible only for loss caused by his own negligence or mistake; and is not liable if he has shown the diligence usual with good business men under similar circumstances.<sup>2</sup> A warehouseman, it has been said, by the custom of a particular trade, may be liable as insurer.<sup>3</sup> But this custom must be brought home to the parties so as to make part of the contract. Ordinarily a warehouseman is only liable for losses produced by a lack of those precautions which are undertaken by prudent storers of goods under similar circumstances.<sup>4</sup> And this has been held in respect to bailees of horses;<sup>5</sup> even the buyer of a horse with a right to return on breach of warranty not being divested of the privilege of rescission by the intermediate injury of the horse through *casus*.<sup>6</sup>

*Casus* a defence to suit against bailee.

§ 321. We have elsewhere seen that impossibility is no defence to an action on a contract in the nature of a guarantee.<sup>7</sup> This is eminently the case with guarantees that third parties should do a particular thing.<sup>8</sup> It is otherwise when the third party is prevented from doing the specified thing by the action of the legal authorities having jurisdiction, as where a party for whom bail have entered into a recognizance has been convicted and imprisoned by a tribunal of the state having jurisdiction of the recognizance, and is thus prevented

Bail bond and other guarantees relieved by *casus* or necessity.

<sup>1</sup> Wh. on Neg. § 561; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Colt v. McMechen*, 6 Johns. 160; *Railroad Co. v. Reeves*, 10 Wall. 176; *Holladay v. Kennard*, 12 Wall. 254; *Denny v. R. R.*, 13 Gray, 481; *Morrison v. Davis*, 20 Penn. St. 175; *South. Ex. Co. v. Craft*, 49 Miss. 480.

<sup>2</sup> *Coggs v. Bernard*, L. Ray. 909; *Giblin v. McMullen*, L. R. 2 P. C. 317; *Doorman v. Jenkins*, 2 A. & E. 256; *Field v. Brackett*, 56 Me. 121; *Foster v. Bank*, 17 Mass. 500; *Smith v. Bank*, 99 Mass. 605; *Edson v. Weston*, 7 Cow. 278; *Scott v. Bank*, 72 Penn. St. 471; and cases cited Wh. on Neg. § 461 *et seq.*; 569 *et seq.*

<sup>3</sup> *North Brit. Ins. Co. v. London Ins. Co.*, L. R. 5 Ch. D. 569.

<sup>4</sup> Wh. on Neg. §§ 573 *et seq.*

<sup>5</sup> *Leake*, 2d ed. 707; *Williams v. Lloyd*, W. Jones, 179.

<sup>6</sup> *Head v. Tattersall*, L. R. 7 Ex. 7.

<sup>7</sup> See *supra*, § 311.

<sup>8</sup> *Lamb's case*, 5 Co. 23 b; *Thornbury v. Bevil*, 1 Y. & C. 564; *Lloyd v. Crispe*, 5 Taunt. 249; see *M'Neill v. Reed*, 2 Moore & S. 89; 9 Bing. 68.

from attending court in compliance with the conditions of the recognizance.<sup>1</sup> The death, also, or mortal sickness of the principal, is a bar to the suit;<sup>2</sup> though not, it is said, the principal's insanity, in cases where a *habeas corpus* could be maintained to bring him into court;<sup>3</sup> though a commitment by the proper local authorities to an insane asylum would be a defence.<sup>4</sup> That the principal has been convicted and imprisoned by a court of the same state having jurisdiction, has been repeatedly ruled to be a defence;<sup>5</sup> though it is otherwise when the imprisonment is for a short duration, which is ground only for a continuance in a suit against the bail.<sup>6</sup> Imprisonment of the principal in another state from that in which the bail is entered is no excuse, since the principal could, by going to another state, in this way relieve himself at his own will;<sup>7</sup> though such is not the case when he is surrendered by the state having jurisdiction of the bail bond.<sup>8</sup> The rule is, that "the bail is entitled to relief when the surrender is made impossible by the act of the law, where the plaintiff loses nothing by the omission of any act which it is in the power of the bail to perform; the governing principle being that as the power of making the surrender is taken away by an act of the law, the obligation to surrender is thereby discharged by law; as the surety cannot, by law, surrender his principal, he cannot, by law, be held answerable for not surrendering."<sup>9</sup> Hence, compliance with the bond cannot be said to be impossible when the principal could have

<sup>1</sup> See *supra*, § 305.

<sup>2</sup> *People v. Manning*, 8 Cow. 297; *People v. Tubbs*, 37 N. Y. 586; *Scully v. Kirkpatrick*, 79 Penn. St. 324; *Mather v. People*, 12 Ill. 9; *State v. Cone*, 32 Ga. 331.

<sup>3</sup> *Adler v. State*, 35 Ark. 517. See *Hamilton v. Dunklee*, 11 N. H. 172; *Brandt on Suretyship*, § 428.

<sup>4</sup> *Fuller v. Davis*, 1 Gray, 612.

<sup>5</sup> *Way v. Wright*, 5 Met. (Mass.) 380; *People v. Bartlett*, 3 Hill, 570; *Wilhelm v. Caul*, 2 W. & S. 26; *Canby*

*v. Griffin*, 3 Harring. 333; *Caldwell's case*, 14 Grat. 698; *State v. Adams*, 3 Head, 259; *Belding v. State*, 25 Ark. 315; *Cooper v. State*, 5 Tex. Ap. 215.

<sup>6</sup> *Phoenix Fire Ins. Co. v. Mowatt*, 6 Cow. 599. That imprisonment of a principal by a provost marshal during the late civil war excused the bail, see *Com. v. Webster*, 1 Bush, 616.

<sup>7</sup> See *supra*, § 306.

<sup>8</sup> *State v. Allen*, 2 Humph. 258.

<sup>9</sup> *Van Syckel, J., Steelman v. Mattix*, 38 N. J. L. 247.

complied with its stipulation but neglected to do so.<sup>1</sup>—A *voluntary* enlistment in the army by the principal does not relieve the bail any more than would any other voluntary escape by the principal.<sup>2</sup> Compulsory conscription of the principal, however, excuses the bail.<sup>3</sup>—Escape, before there has been a formal surrender, does not discharge the bail,<sup>4</sup> though it is otherwise when there has been a formal surrender made and accepted.<sup>5</sup>—When the principal, as is alleged, has fled from mob violence, this is no defence, so it is maintained, unless the government is unavailingly appealed to for protection. In a case in Kentucky, in 1881, where this defence was interposed,<sup>6</sup> it was said by the court: “The evidence shows that at that time the county of Elliott, in which the proceedings were had, was overrun by a band of so-called regulators, that they had killed several persons and had shot and seriously wounded the accused, and had threatened to take his life whenever they might find him, and that by reason of these threats the accused was compelled to abscond. It is contended by counsel that as it is the duty of the Commonwealth to protect the lives of her citizens, it ought not to require the citizen to discharge any duty or to comply with any obligation when such protection is not extended, and that the bail should be exonerated as in case of sickness of the accused, which renders it physically impossible for him to attend in response to his bond. This ought unquestionably to be true when the constituted authorities are unable or indisposed, when properly called upon, to protect the citizen in the dis-

<sup>1</sup> Ibid. See *State v. Merrihew*, 47 Iowa, 112. See generally as to liability on bail bond, Brandt on Suretyship, §§ 428 *et seq.*; *Bailey v. De Crespigny*, L. R. 4 Q. B. 180; *Pres. Ch. v. New York*, 5 Cow. 538; *Bennett v. Woolfolk*, 15 Ga. 213. For analogous cases, see *supra*, § 305.

<sup>2</sup> *Harrington v. Dennis*, 13 Mass. 93; *State v. Reany*, 13 Md. 230; *State v. Scott*, 20 Iowa, 23; *Shook v. People*, 39 Ill. 443; *Huggins v. People*, 39 Ill. 241; *contra*, *People v. Cook*, 30 How. Pr. 110. That under such circum-

stances the suit against the bail may be continued, see *Gingrich v. People*, 34 Ill. 448.

<sup>3</sup> *Alford v. Irwin*, 34 Ga. 25.

<sup>4</sup> *State v. Tiernan*, 39 Iowa, 474; *Lee v. State*, 51 Miss. 665; *State v. Norment*, 12 La. 511.

<sup>5</sup> See *Com. v. Coleman*, 2 Met. (Ky.) 382; *Askins v. Com.*, 1 Duvall, 275; *Smith v. Kitchens*, 51 Ga. 158; and cases cited, Brandt on Suretyship, § 433.

<sup>6</sup> *Weddington v. Com.*, 3 Ky. Law Rep. 441.

charge of the duty, but in this case appellants made no application for protection to the accused, and do not in any way show that the authorities were either unable or unwilling to extend the protection necessary to enable the accused to appear. It does not come in the category of cases where the accused is prevented from appearing by the act of God."—On the same reasoning, permanent illness of an apprentice, making his performance of his covenants impossible, is a defence to his father when sued as surety.<sup>1</sup> A person, also, who undertakes to introduce another person into a partnership of which he is a member, guarantees the assent of the other members of the partnership to the introduction.<sup>2</sup>—"I entirely agree with the principle that where a covenant is made that a stranger shall do or accept particular acts, that covenant must be performed at the peril of the covenantor."<sup>3</sup>

§ 322. With alternative and generic obligations impossibility is not a defence, unless it meets every contingency in which the work promised could be performed. An example of the generic obligation is to be found, in the Roman law, in the promise of *operae*, when the day in which the *operae* are to be performed is not designated, or the person who is to perform the *operae* is left undetermined.<sup>4</sup> In the last case applies the maxim *genus non perit*; impossibility cannot be a defence, since it cannot be said that obtaining a laborer of an indeterminate class is impossible.—It may be, however, that a contract for work is made dependent upon some particular thing which has ceased to be.<sup>5</sup> Transport, for instance, is to be effected in a particular ship, which ship alone has contrivances adapted to the due conveyance of the particular kind of goods to be carried. The loss of this ship, without fault of the party so contracting, would be a defence to a suit for

<sup>1</sup> Boast v. Firth, L. R. 4 C. P. 1, cited *supra*, § 300; *infra*, §§ 323, 613. See Simeon v. Watson, 46 L. J. C. P. 679; Caden v. Farwell, 98 Mass. 137.

<sup>2</sup> M'Neill v. Reid, 9 Bing. 68; Leake, 2d ed. 698.

<sup>3</sup> Bayley, J., Hughes v. Humphreys, 6 B. & C. 680; and see *supra*, § 311.

<sup>4</sup> L. 54, § 1, D. de V. O.; Mommsen, *op. cit.* 53.

<sup>5</sup> See for cases where covenants to mine are vacated by failure of miner, *supra*, § 298.

failure in carrying these goods in this way.<sup>1</sup> Where, in other words, the sole agency of performing a contract for work is destroyed, without fault of either party, there is a cause of action to neither.<sup>2</sup> Hence, a fatal contagious disease at a place where a workman contracted to work, may be set up as a defence to a suit against him for non-performance of his contract.<sup>3</sup> It is otherwise, however, when other modes of performing the work can be found, though at great additional cost to the promisor; and, hence, the burning of a house under construction is, as is elsewhere seen, no defence to a suit against a contractor for non-performance of his contract to build the house.<sup>4</sup>—Hiring of labor (*locatio operarum*) has a close relationship, in this connection, so Mommsen argues,<sup>5</sup> to hiring of things. It is of the essence of both contracts that they should not be regarded as fulfilled until the work is performed. The transaction is to be completed *in futuro*. “Opera in actu consistit; nec ante in rerum natura est, quam si dies venit, quo praestanda est; quam admodum cum stipulamur, quod ex Arethusa natum erit.” Nor is the likeness limited to this feature. The several parts of the service in the *locatio operarum* corresponded with the several parts of the price paid in the same way as the several periods of the enjoyment of a thing hired correspond with the several parts of the price paid for the hiring. Hence, the duties of the employee, in the contract for labor, are divisible, as are the duties of the lessee of a thing. After a critical and elaborate review of the authorities to this effect, Mommsen states the conclusion to be that the employee (*locator operarum*), in cases where the further performance is broken up by *casus* occurring without his fault, cannot recover the price of services beyond those actually rendered; but that he can recover damages for his losses on the whole contract in all cases in which performance is arrested by the misconduct of the employer, or by the employer throwing up the contract unless under the stress of

<sup>1</sup> Mommsen, *ut supra*; see *supra*, § 308.

<sup>2</sup> *Supra*, § 300; Appleby v. Meyers, L. R. 2 C. P. 651; Brumby v. Smith, 3 Ala. 723.

<sup>3</sup> Lakeman v. Pollard, 43 Me. 463.

<sup>4</sup> Adams v. Nichols, 19 Pick. 275; see *infra*, §§ 326, 714.

<sup>5</sup> *Op. cit.* 353.

necessity. On the other hand, the employee cannot recover for services whose performance became impossible without the employer's fault; and, hence, when a laborer is employed to work for a series of days in a particular building, the burning of the building stops the employer's liability for wages. In such case wages can only be recovered for the work actually performed. Whether, however, when the price is fixed for the entire period, time is the sole standard of reduction, depends upon the peculiar terms of the contract and the circumstances of the concrete case. Frequently, in contracts of this class, there is a rising scale of prices, conditioned upon the assumed growing capacity of the employee. In such cases, the sum to be recovered by the employee, if the employer is held liable, may be larger than it would be if the contract price alone was followed.—In case of the employee's temporary sickness, then, if the wages are so much for each day's work, he can only recover for the days he was working; though, when the wages are not so adjusted, but a salary is fixed for a specific extended period of time, then the inference is that short sicknesses are not to be deducted. Whether the contract can be rescinded depends upon whether the *casus* is such as to interfere with the future performance of the contract. The question in our own practice is hereafter distinctively considered.<sup>1</sup>

§ 323. Subsequent impossibility is a defence to a suit for a personal duty when the contracting party becomes, without his own fault, incapable of performing his contract. He may become actually incapable of business, or, though he may not be thus incapable, he may not stand in a relation to the thing promised which enables him to dispose of it. Under the last head fall cases in which the party contracting has not the absolute control of the thing he undertakes to alienate. This, according to the Roman law, does not affect the validity of the obliga-

Subjective  
incapacity  
no defence  
to duty not  
exclusively  
personal.

<sup>1</sup> See *infra*, § 714; *supra*, § 311; and 25 Conn. 188; *Wolfe v. Howes*, 20 N. see *Farron v. Wilson*, L. R. 4 C. P. Y. 197; *Alexander v. Smith*, 4 Dev. 744; *Knight v. Bean*, 22 Me. 531; *Hubbard v. Belden*, 27 Vt. 645; *Fuller v. Brown*, 11 Met. 440; *Ryan v. Dayton*, ed. § 571.

tion. "Si quis promittat (mihi rem) cujus commercium non habet: ipsi nocere, non mihi."<sup>1</sup> The damage is to fall on the party contracting to deliver a thing he was incapable of delivering. This principle has been applied to contracts of exchange,<sup>2</sup> and of bailments generally.<sup>3</sup> Subsequent loss of means to pay a debt, therefore, is no defence to a suit for the debt; subsequent sickness is no defence to a suit to do a particular thing in all cases where the thing could have been done by others than the promisor, and in which, therefore, it was not to be inferred from the contract that the agreement was only binding when capable of being performed by him personally.<sup>4</sup> Hence, "when the thing or work can be done by another person, then all accidents are at the risk of the promisor."<sup>5</sup> "Where a party contracts to do anything which does not absolutely require him to do it in person, sickness does not excuse: for he ought to have provided for it in the contract itself."<sup>6</sup> It is otherwise, however, when the duty imposed is one that was to be exclusively performed by the promisor, and could only be performed by him.<sup>7</sup> Where, therefore, the services promised are such as can only be rendered by the person promising, his subsequent intervening incapacity, for which he is not responsible, is a defence to an action against him for breach of contract. This rule was applied in a suit against a pianist of peculiar excellence for failure to perform at a concert from which he was kept by a

<sup>1</sup> L. 34, D. de V. O. (45-1). A similar ruling is contained in L. 49, § 3, D. de legat. (2, 31).

<sup>2</sup> L. 1, § 1, D. rer. per. (19-4).

<sup>3</sup> L. 9, pr. L. 15, § 8, D. locati (19, 2). See to same effect, *Wilkinson v. Lloyd*, 7 Q. B. 27; and *supra*, § 311; *White v. Mann*, 26 Me. 361; *Leonard v. Dyer*, 26 Conn. 172. That insolvency is not a defence, see *Lewis v. Ins. Co.*, 61 Mo. 539; whether an assignee can recover on an executory contract dependent on action by assignor, see *infra*, § 848.

<sup>4</sup> *Robinson v. Davison*, L. R. 6 Ex. 269; *Boast v. Firth*, L. R. 4 C. P. 1; *Dickey v. Linscott*, 20 Me. 453; *Knight v. Bean*, 22 Me. 531.

<sup>5</sup> *Miller, J., Wheeler v. Ins. Co.*, 82 N. Y. 550; citing *Wolfe v. Howes*, 20 N. Y. 197; *Clark v. Gilbert*, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40; *S. P. Alexander v. Smith*, 4 Dev. 364.

<sup>6</sup> *Per cur.*, *Smith v. Ins. Co.*, Sup. Ct. Penn. 1882; 13 Rep. 607; citing *Scully v. Kirkpatrick*, 79 Penn. St. 324.

<sup>7</sup> *Dickey v. Linscott*, 20 Me. 453; see *infra*, § 848.

dangerous illness.<sup>1</sup> And the same principle is applicable to an engagement by an actor of a particular type to play for the manager of a theatre a particular line of parts.<sup>2</sup> A contract, also, by R. with S., the proprietor of a theatre, to give a certain number of performances, ceases to be obligatory on the supervening incapacity of the principal performer and chief attraction in R.'s company.<sup>3</sup> This rule is *a fortiori* applicable in cases where the promisor in a personal contract dies.<sup>4</sup> Entire incapacity, also, of a party to receive services,—*e. g.* tuition,—coupled with the non-rendering of such services,—is a defence to a suit for the price of such services.<sup>5</sup> And when the person thus exclusively qualified to perform a particular service fails from sickness or other incapacity in performing the service, the promisee can rescind the contract.<sup>6</sup> “Where personal considerations are of the foundation of the contract, as in the cases of principal and agent and master and servant, the death of either party puts an end to the relation;”<sup>7</sup> though it has been held by several courts that acts *bona fide* executed for the principal, before notice of his death, bind his estate as against *bona fide* third parties.<sup>8</sup> A partnership, also, is dissolved by the death of one of its members, notwithstanding that it is by its terms to continue for a period as yet unexpired.<sup>9</sup> In case of the sickness or death of a contractor,

<sup>1</sup> Robinson *v.* Davison, L. R. 6 Exch. 269; and see Spalding *v.* Rosa, 71 N. Y. 401; Stubbs *v.* R. R., L. R. 2 Ex. 311; Howell *v.* Coupland, L. R. 9 Q. B. 469; see *infra*, § 848.

<sup>2</sup> De Rivafinoli *v.* Corsetti, 4 Paige, 264; see Lumley *v.* Wagner, 1 D. M. & G. 604; Hamblin *v.* Dinneford, 2 Edw. 529.

<sup>3</sup> Spalding *v.* Rosa, 71 N. Y. 40.

<sup>4</sup> Hall *v.* Wright, E. B. & E. 791.

<sup>5</sup> Boast *v.* Firth, L. R. 4 C. P. 1; cited *supra*, § 300; *infra*, § 613; Simeon *v.* Watson, 46 L. J. C. P. 679; Stewart *v.* Loring, 5 Allen, 306. That the other party is discharged, see Jackson *v.* Ins. Co., L. R. 10 C. P. 144; *infra*, § 613.

<sup>6</sup> Leake, 2d ed. 705; Poussard *v.*

Spiers, L. R. 1 Q. B. D. 410; Knight *v.* Bean, 22 Me. 531; *infra*, § 919.

<sup>7</sup> Farrow *v.* Wilson, L. R. 4 C. P. 744; Blades *v.* Free, 9 B. & C. 167; Campanari *v.* Woodburn, 15 C. B. 400; Clarke *v.* Courtney, 5 Peters, 319; Gale *v.* Tappan, 12 N. H. 145; Marlett *v.* Salkman, 3 Allen, 287; Saltmarsh *v.* Smith, 32 Ala. 404; Ferris *v.* Irving, 28 Cal. 645.

<sup>8</sup> Cassiday *v.* McKenzie, 4 W. & S. 282; Carriger *v.* Whittington, 26 Mo. 311; Ish *v.* Crane, 8 Oh. St. 520; 13 Oh. St. 576; see Wh. on Ag. §§ 103-4.

<sup>9</sup> Lindley on Part. 2d ed. 492; Holme *v.* Hammond, L. R. 7 Ex. 218; *infra*, § 848.



bound by a personal service of this class, which service is to be performed and paid for in instalments, that portion of the work that has been completed before the incapacity intervened is to be paid for either under the contract or on a *quantum meruit*.<sup>1</sup> A master's death, also, terminates his liability on a contract of apprenticeship;<sup>2</sup> and a contract for the services of a farm bailiff, which by its terms is determinable by six months' notice, or payment of six months' wages, is dissolved by the death of the employer, without leaving any claim on the part of the bailiff to be continued in the service, or for six months' wages.<sup>3</sup>

In the Roman law, not only death, but loss through *casus* of the capacity of the employee, is a defence on a contract to render particular services, as where an artist who undertakes to paint a particular picture loses the use of his hand by an accident. *Temporary* incapacity, however, only vacates the contract when it extends over the period within which the services are to be performed. Of course, such personal incapacity is not a defence when the work can be done by a substitute, and the appointment of a substitute is practicable.—The circumstances, as is noticed by Mommsen,<sup>4</sup> from which it is to be determined whether a contract of service is distinctively personal are various. It is requisite to take into account, in such cases, the personal qualities of the parties, the custom in similar cases, the local usage under analogous circumstances. The nature of the service itself is to be first considered; and this is brought prominently forward in L. un. § 9, C. de caducis tollendis (6, 51).—Some contracts derive a distinctively personal character from the peculiar legal relations by which they are environed. Of these a marriage contract is an illustration; a hindrance in the way of one of the parties being distinctively personal, a substitute not being

<sup>1</sup> *Stubbs v. R. R.*, L. R. 2 Ex. 311; *Fenton v. Clark*, 11 Vt. 557; *Patrick v. Putnam*, 27 Vt. 759; *Clarke v. Gilbert*, 26 N. Y. 279; and other cases cited in *Wald's Pollock*, 370; and see *Whincup v. Hughes*, L. R. 6 C. P. 78.

<sup>2</sup> *Whincup v. Hughes*, L. R. 6 C. P. 78. As to apprenticeship, see *infra*, § 603.

<sup>3</sup> *Farrow v. Wilson*, L. R. 4 C. P. 744; *infra*, § 848.

<sup>4</sup> *Op. cit.* 72.

from the nature of things allowed.<sup>1</sup> Insanity, therefore, is a defence to such a contract.<sup>2</sup>—Another illustration is to be found in cases where one party bears a peculiar personal relation to the other party, involving duties such as the *operæ officiales* which freedmen owed to their patrons.<sup>3</sup> The principal distinction, however, rests in the character of the work to be done. Some services are independent, from the nature of things, of the personal qualities of the employee, as is the case where A. agrees to pay a debt of B., or to buy an article for B. at a fixed price. The same may be generally said of mechanics. A man agrees to do a particular piece of carpenter work. The fact that he is taken sick does not relieve him if he has the opportunity to provide a substitute, but neglects so to do. On the other hand, a commission that requires peculiar artistic, literary, or scientific skill for its execution assumes that the work will be done by the specific employee, the substitution of another not being contemplated. Hence, when an author is employed to write a particular book for a publisher on a topic in which the author is an expert, or a specialist in surgery to perform a particular operation, sickness, producing incapacity, would be a defence to an action for non-performance, such sickness not being imputable to negligence. Certain parts of a particular work are distinguishable in this respect—as a sculptor may delegate some portions of his undertaking to others, while portions requiring his distinctive touch he must execute himself. By Mommsen it is declared, as a general rule,<sup>4</sup> that the greater the discretion given to the employee, the more exclusively is the commission to be regarded as personal. With regard to mechanics, we have the following:<sup>5</sup> “*Inter artifices longa differentia est et ingenii, et naturae, et doctrinae, et institutionis. Ideo si navem a se fabricandam quis promiserit, vel insulam aedificandam, fossamve faciendam, et hoc specialiter actum est, ut suis operis id perficiat; fide jussor ipse aedificans vel fossam fodiens, non consentiente stipulatore, non liberavit reum.*”

<sup>1</sup> See *infra*, § 324.

<sup>4</sup> Op. cit. 77.

<sup>2</sup> L. un. § 9, C. de cad. toll. (6, 51).

<sup>5</sup> L. 31, D. de solut. (46, 3). Ulp.

<sup>3</sup> L. 9, § 1, D. de operis libert. 1, 7, Disputal.—Mommsen, op. cit. §2. (38, 1).

In this passage the various gradations of skill in mechanical industries are expressly noticed; but at the same time it is treated as settled that the right of an employee to substitute another in his place exists unless otherwise expressly stipulated. And it is elsewhere directly stated that he who undertakes an *opus*, or a piece of job-work, may employ others to do it in his place.<sup>1</sup> Hence a workman engaged in such a task must, if personally hindered, find some one as a substitute; nor, if such substitute can be found, can he set up his personal hindrance as a defence, no matter how inevitable was the *casus* that hindered him. This, of course, is subject to the qualification that no such duty of substitution exists when the employee was selected on the ground of distinctive qualifications of high grade, being the object of special confidence from the employer, and with no power of delegation given him in case of his incapacity to act.—As will be hereafter seen, the question whether the assignee of an executory contract can recover depends upon whether the duty is one which the assignor alone can perform.<sup>2</sup>

§ 324. A person who, knowing himself to be incapable of marriage by reason of a prior marriage on his part, of which the woman to whom he is engaged was ignorant at the time of the engagement, is liable to an action for damages for breach of promise,<sup>3</sup> though the more proper form of action would be an action for deceit. As death of either engaging party is a bar to such a suit, the executor of a deceased party acquires no right, and is exposed to no liability even when the breach of promise was before death.<sup>4</sup>—In such suits the defendant cannot object that performance of the engagement was not demanded from him by the other party.<sup>5</sup>—Whether a subsequently accruing incapacity to marry is defence to an engagement to marry was mooted in England in a case in which the Queen's

Incapacity for marriage a defence to an engagement to marry.

<sup>1</sup> L. 12, § 6, D. de usu et habit. ward v. Littlewood, 5 Ex. 775; and (7, 8); L. 48, pr. D. locati (19, 2); cases cited *infra*, §§ 575, 606. and other passages cited in Mommsen, <sup>4</sup> Chamberlain v. Williamson, 2 M. & S. 408.

<sup>2</sup> See *infra*, § 848.

<sup>5</sup> *Infra*, §§ 575, 606.

<sup>3</sup> Wild v. Harris, 7 C. B. 999; Mill-

Bench was equally divided, and in which a majority of four to three in the Exchequer Chamber held that bodily disease making a man unfit for marriage is not a defence to a suit for breach of promise.<sup>1</sup> It was not a condition, so it was ruled, to the marriage contract that there should be a state of health "as makes it not improper to marry." The conclusion of the majority rests on two positions:—first, that the defendant's bad health made marriage not impossible, but only imprudent; secondly, that the social position incident to marriage, is a primary object with a woman in marrying, and that a person promising to give this position to a woman would be bound to make the promise good, though he failed in other qualifications. As to the first position it may be observed that, if "imprudence" is a defence to a suit for breach of promise of marriage, then there are few suits of this class that could be maintained. But supposing it should appear, as a matter of fact, that the defendant was physically impotent, is the promise one he ought to perform, and for non-performance of which he should be compelled to pay damages? On this point, Mr. Pollock<sup>2</sup> justly observes, that "it cannot be maintained, except against the common understanding of mankind, and the general treatment of marriage by the law of England, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipal v. Smith*,<sup>3</sup> that when the main part of a contract has become impossible by an excepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal; but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which, for the obvious reasons indicated in some of the judgments, is not at all likely to recur." To this, it may be added, that if impotency is a ground for annulling a marriage, no engagement to marry should be held binding on a person who after the engagement

<sup>1</sup> *Hall v. Wright*, E. B. & E. 746, 29 L. J. Q. B. 43.

<sup>2</sup> 31 ed. 393.

<sup>3</sup> L. R. 7 Q. B. 404.

turns out to be impotent, or whose health is such that marriage would be likely to have a physical action destructive of life. A woman would not be bound by a promise to marry under such circumstances; it is hard to see why a man should be held bound if it should appear as a matter of fact, that his life would be imperilled by sexual cohabitation, or if sexual cohabitation was impossible to him. Of course, a party who entered into an engagement of marriage cognizant of such circumstances would be liable in an action of deceit.<sup>1</sup>

§ 325. It is elsewhere observed that *casus* is no defence when it is induced by the misconduct of the party setting it up as a ground of impossibility.<sup>2</sup> The same remark may be made on the question of subjective incapacity. A party who by his misconduct makes himself incapable of performing a contract he has made, is liable in damages for such misconduct, even though the time

Incapacity,  
when self-  
inflicted,  
no defence.

<sup>1</sup> *Supra*, § 248. In *Allen v. Baker*, 86 N. C. 91, the defendant failed to fulfil a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the married state. Held, that he would be answerable in damages if the disease was contracted subsequently to the time of making the promise, or if before and he knew his infirmity was incurable; but if it was contracted prior to the promise and he had reason to believe it was temporary only, he would be excusable. The court said: "We cannot understand how one can be liable for not fulfilling a contract, when the very performance thereof would in itself amount to a great crime, not only against the individual, but against society itself. . . . The usual, and we may say legitimate, objects sought to be attained by such agreements to marry, are the comfort of association, the *consortium vite*, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and

the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so." The court disapproved *Hall v. Wright*, which, however, seems to be supported by *Boast v. Firth*, L. R. 4 C. P. 8, where Montagu Smith, J., says: "In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position, so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

<sup>2</sup> *Supra*, § 312; *infra*, §§ 603, 716, 747, 901.

for performance has not yet arrived.<sup>1</sup> Hence, where a business was to be paid for by instalments, dependent upon the amount of the profits, it was held an implied undertaking that the buyer should carry on the business, and that by discontinuing it, so as to prevent an account, he became liable in damages for the price.<sup>2</sup> The action in such case is not for specific performance, but for damages for non-performance; and, in such cases, it is not necessary for the plaintiff to demand performance.<sup>3</sup> Nor in such case can the party disabling himself set up a technical default on the other side.<sup>4</sup>

§ 326. The fact that a thing on which work is expended, as a divisible contract of labor, has been destroyed without fault of either party, before the work is complete, is no defence to a suit for the payment of the work so far as done,<sup>5</sup> nor can, *a fortiori*, the

<sup>1</sup> Wald's Pollock, *ut supra*, 371, citing Leake on Contracts, 351, 460; Newcomb v. Brackett, 16 Mass. 161; Buttrick v. Holden, 8 Cush. 233; Harriss v. Williams, 3 Jones, L. 483; S. P., Beswick v. Swindells, 3 A. & E. 883.

<sup>2</sup> Telegraph Despatch Co. v. McLean, L. R. 8 Ch. 658; Maclure *ex parte*, L. R. 5 Ch. 737.

<sup>3</sup> *Infra*, §§ 575, 606.

<sup>4</sup> *Infra*, § 606.

<sup>5</sup> *Infra*, § 714; Garretty v. Brazell, 34 Iowa, 100; Schwartz v. Saunders, 46 Ill. 18; Rawson v. Clark, 70 Ill. 656; Cook v. McCabe, 53 Wis. 250; Hollis v. Chapman, 36 Tex. 1. That subsequent impossibility of performance is a defence to a contract of work, see *supra*, § 322. In Cook v. McCabe, *ut supra* (see statement in 25 Alb. L. J. 246), the plaintiffs, who were builders, were to assist in building a house for the defendant, and as their special share were to do all the mason work thereon, and such building work as defendant was not to do, and to furnish such material as defendant was not to furnish. Defendant was to furnish some of the material for the mason work, and to haul certain

of that furnished by plaintiffs. They were not to do any of the carpenter or joiner work or any of the painting or glazing. They were to have the entire work done by them completed by October 1, 1878, and were to receive their pay, which was to be \$580, after the completion of the work. The contract stipulated for \$250 damages in case either party failed to comply therewith. The complaint alleged that by reason of a neglect on the part of defendant to do his portion of the work, plaintiffs were hindered, but that they had nearly completed the work they were to do on the 19th of October, 1878; that on the 20th of October, without fault on their part, the building was destroyed by fire. They asked to recover for the value of the work and materials they had furnished. The answer, among other things, denied performance of the contract. Judgment was given for plaintiffs, from which defendant appealed. This was affirmed by the supreme court. From the opinion of Cassaday, J., the following passages are extracted:—

“So ‘where a person contracted to

money paid by the owner to the operative for such partial performance be recovered back.<sup>1</sup> The ques-  
quently destroyed.

build a house on the land of another, and the house was, before its completion, destroyed by fire without his fault, it was held that he was not thereby discharged from his obligation to fulfil his contract.' *Adams v. Nichols*, 19 Pick. 275.

'Such cases are distinguishable from one where the contractor agrees to repair another's house already built, and it burns before completion of the repairs. *Lord v. Wheeler*, 1 Gray, 252; *Wells v. Calnan*, 107 Mass. 517. But the case at bar is not one of an entire contract to complete an entire building. It is more like *Brumby v. Smith*, 3 Ala. 123, in which it was held that 'where a workman agrees to complete the carpenter's work on a house, and to receive a certain sum on the completion of the work, his employer furnishing the materials, and the house and materials were destroyed by fire, without the fault of the workman, the house being in the possession of the employer, the workman could not recover a *pro rata* compensation for the work actually done.'

'The opinion in that case is based upon *Cutter v. Powell*, 6 Durnf. & East, 320, and *Menetone v. Athawes*, 3 Burrows, 1592. In *Cutter v. Powell*, the sailor was to be paid the sum named, 'provided he proceed, continue and do his duty on board for the voyage;' and that case, in the language of *Allen, J.*, in *Wolfe v. Howes*, 20 N. Y. 200, 'is distinguishable in this: that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life, and

to render at all hazards his personal service during the voyage, before the completion of which he died.'

'*Lord Kenyon*, in deciding *Cutter v. Powell*, refers to the peculiar terms of the contract, and says 'it was a kind of insurance.' Page 324. See *Taylor v. Laird*, 25 L. J. Ex. 329. In the other case referred to—*Menetone v. Athawes*—the shipwright took the ship into his own dock for repairs, the owner agreeing to pay a sum named for the use of the dock, and also for the repairs; and it was held that 'the value of repairs may be recovered though the ship be burnt in dock.'

'In *Niblo v. Binsse*, 3 Abb. N. Y. App. Dec. 375; S. C., 1 Keyes, 476, it was held that 'if the owner of a building contracts for labor upon it, he is under an implied obligation to have the building ready and in a condition to receive the labor contracted for; and if, before the work is completed, the building is destroyed by fire, without the fault of the contractor, the owner is in default, and the contractor can recover for all that was done up to the time of the fire.' In that case, as well as this, the time of performance had been extended by the mutual assent of the parties to the contract. *Schwartz v. Saunders*, 46 Ill. 18, was a case where 'the plaintiff entered into a contract with the defendant to do the carpenter work and furnish the materials therefor upon a brick building; the mason work was to be done by another and independent contractor. After the brick work was nearly completed and a part of the carpenter work done, the brick walls were blown down. Held, that the loss of the carpenter work fell

<sup>1</sup> *Anglo-Egyptian Nav. Co. v. Rennie*, L. R. 10 C. P. 271. See this case discussed *infra*, § 745.

tion, under such circumstances, depends upon the divisibility of the contract. If the contract be divisible, and if a part of

upon the defendant.' The court properly distinguished the case from some of the cases cited above; on the ground that 'the plaintiff had not undertaken to erect and finish this building and deliver it.'

"In *Rawson v. Clark*, 70 Ill. 656, the contractors agreed to manufacture and put into a building, then in process of construction, certain iron work, but were prevented from completing their contract by the building being destroyed by fire without their fault, and the court held they could recover *pro tanto*, and without performing the balance of their contract.

"*Hollis v. Chapman*, 36 Tex. 1, was a case where the plaintiff, a carpenter, undertook to furnish materials and do the wood work necessary to finish the defendant's brick building, and to turn over the building complete by a given day, for a specified gross sum. When the plaintiff had nearly completed the work, the building was destroyed by fire, without his fault, and the court held that the plaintiff was entitled to recover for the materials furnished and work done by him. Stress was there laid upon the fact that the contract was conditional—that is, dependent upon the execution of another contract—and hence it was held to be apportionable, and the contractor entitled to a *pro rata* pay for his work.

"The facts stated clearly distinguish the case from *Jackson v. Cleveland*, 15 Wis. 107, and all the other cases cited by the counsel for the appellant, unless it is *Brumby v. Smith*, 3 Ala. 123, and that, in our judgment, is not sustained by principle or authority, and should, therefore, be disapproved. Upon principle as well as the authorities cited,

we are induced to hold that—(1) Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. (2) But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, either express or implied. (3) Where from the nature of the contract it appears that the parties must, from the beginning, have known that it could not be fulfilled, unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. (4) Where, as here, one having nothing to do with the painting, glazing, carpenter or joiner work, contracts to furnish materials for the mason work of a building and perform the labor thereon, except that the owner, for whom the same was to be constructed, was to furnish upon the ground all the sand, stone, and a certain quantity of lime, and haul all the brick, and the building, not being in the exclusive possession of such contractor, just before completion is destroyed by fire, without the fault of the



it remains incomplete in consequence of the occurrence of an event for which neither party is responsible, then there may be a recovery for the portion performed.<sup>1</sup> When, however, a contract is indivisible, the cessation of the existence of the object of the contract, if imputable to *casus*, is "a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither."<sup>2</sup>—On the general principle above stated, a substitute soldier, who agreed to serve for a year, but was released by the termination of the war, was held entitled to the full amount to be paid, he having abandoned other employments and devoted himself to this.<sup>3</sup> But if a pupil is taken sick so as to be unable to attend a school in which he has engaged a place, this is an excuse for payment of the tuition fees, unless it should appear that the place was taken to the exclusion of some one else.<sup>4</sup>—In the Roman law, contracts of labor (*locatio operarum*) by which a party agrees to work for a particular length of time, are distinguishable from jobbing contracts (*locatio operis*), or contracts to work at a particular thing, in this, that in the latter the contract is usually indivisible. Until the work of the *locatio operis* is finished, there is no performance. Hence, if the thing to be worked at is casually destroyed before its completion (as where a tailor undertakes to make a coat out of materials which are casually destroyed before the coat is made), the employee has ordinarily no claim for compensation. On the other hand, contracts of this class (contracts to work at a particular thing) are subject, as soon as the work is completed, to the rules applicable to contracts of sale of existing things. But before completion, such contracts of labor are likened to contracts for the sale of a *res futura*. And in the Roman law, work which is undertaken for a fixed price on materials furnished by the employee is treated as a sale.—

contractor, the loss must fall upon the owner, especially where he has the same insured at the time for his benefit; and such owner cannot require the completion of the balance of the building without restoring the parts which were so destroyed."

<sup>1</sup> *Infra*, § 714.

<sup>2</sup> *Appleby v. Meyers*, L. R. 2 C. P. 651; and see *Adams v. Nichols*, 19 Pick. 275, cited *supra*, § 322.

<sup>3</sup> *Leas v. Patterson*, 38 Ind. 465.

<sup>4</sup> *Stewart v. Loring*, 5 Allen, 306.

When the contract is to make a particular thing of a particular kind of material (*e. g.* a coat of broadcloth), then the casual destruction of stuff selected by the employee is no defence to a suit against him for damages for non-performance of his contract. The employee, in such cases, takes the risk of such destruction. It is otherwise when specific material is designated by both parties for the *opus*. If this material (*e. g.* a particular piece of cloth selected by the employer) is destroyed without the fault of either party, the employee, on his part, is not bound to pay damages to the employer to indemnify the latter for his loss in the non-delivery of the article, while the employee cannot recover wages for the time spent by him on the article, supposing the work to be indivisible. But, according to Mommsen,<sup>1</sup> when the work is completed, the risk passes to the employer, so that if then the finished article is destroyed without the fault of either party, he becomes liable on his contract to pay for the labor expended by the employee. This is assuming that the work is done in compliance with the employer's directions, otherwise the contract is not complete, nor the risk transferred.—If acceptance is conditioned on approval, then the risk is on the employee until approval.<sup>2</sup> From this rule are to be excepted cases in which the delay in approval is caused by the negligence of the employer. The conclusion at which Mommsen<sup>3</sup> arrives,

<sup>1</sup> 3d ed. 401.

<sup>2</sup> To this point the following citations are made by Mommsen, p. 371: L. 36 D. *locati* (19, 2) Florentin. 1, 7 Instit.; L. 37 D. *eodem* Javolen. I. 8 ex Cassio.

“Opus, quod aversione locatum est, donec adprobetur, conductoris periculum est. Quod vero ita conductum sit, ut in pedes mensurasve praestetur, eatenus conductoris periculo est, quatenus admensum non sit: et in utraque causa nociturum locatori, si per eum steterit, quo minus opus adprobetur vel admetiatur. Si tamen vi majore opus prius interciderit, quam adprobaretur, locatoris periculo est: nisi si aliud actum sit: non enim amplius

praestari locatori oporteat, quam quod sua cura atque opera consecutus esset.” —“Si prius quam locatori opus probaretur, vi aliqua consumptum est, detrimentum ad locatorem ita pertinet, si tale opus fuit, ut probari deberet.”

In the first case a distinction is taken between cases in which the work is assumed *per aversionem*, so that it is to be delivered and submitted to approbation as a whole, and cases in which the work is to be delivered by the foot or measure. In both cases the employee bears the risk until approval, conditioned, when the contract requires, on measurement.

<sup>3</sup> P. 377.

after an elaborate examination of the authorities, is that the employer, in cases in which the thing is destroyed by *casus* before completion, is not bound to pay the price of the labor, though it is otherwise as to destruction after approval. If the destruction occur after completion of the work, but before approval, the employee is only entitled to recover in case the work done was such as necessitated approval.—When delivery is to be in instalments (*in pedes mensurasve*), the measurement may be construed as an approval; the employer takes the risk from the time of measurement under his direction; so that, if after such measurement the thing measured is destroyed, he is bound to pay a proportionate price to the employee. The employer, therefore, in case of non-culpable destruction of the thing contracted for, cannot claim damages for the loss incurred by him, and is not liable to the employee, in such case, until the work is completed according to the terms of the contract. Liability, however, from the employer to the employee, arises in cases in which the employer has given to the employee defective material, or has provided an unsuitable place.

§ 327. A common carrier, by our law, is an insurer of goods committed to him for carriage so far as to be responsible in all cases of non-delivery, unless such non-delivery results from *casus* or *vis major*.<sup>1</sup> Neither fire, unless communicated by lightning or some similar extraordinary interposition,<sup>2</sup> nor theft,<sup>3</sup> nor hidden rocks of which the carrier might have taken notice, are held to be *casus*.<sup>4</sup> That seizure by a public enemy is a defence is elsewhere seen.<sup>5</sup>

Common carrier may defend on ground of *casus*, but not of fire.

<sup>1</sup> Wh. on Neg. § 552; *Forward v. Pittard*, 1 T. R. 27.

<sup>2</sup> Wh. on Neg. § 554; *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent Co.*, 5 T. R. 389; *Hollister v. Nowden*, 19 Wend. 234; *Condict v. R. R.*, 54 N. Y. 500; *Mershon v. Hobensack*, 2 Zab. 372; *Am. Trans. Co. v. Moore*, 3 Mich. 368; *Cox v. Peterson*, 30 Ala. 608; *Hibler v. McCartney*, 31 Ala. 502.

<sup>3</sup> Wh. on Neg. § 554 *a*; *Story on*

*Bailments*, § 528; *De Rothschild v. Royal Mail*, 7 Exch. 734; *Amer. Steamship Co. v. Bryan*, 83 Penn. St. 446.

<sup>4</sup> Wh. on Neg. § 555; *Williams v. Grant*, 1 Conn. 487.

<sup>5</sup> See *supra*, § 319; Wh. on Neg. § 560. In *Williams v. Vanderbilt*, 28 N. Y. 217, the defendant undertook to carry the plaintiff from New York to San Francisco, via Panama. The vessel that was to have carried the plain

§ 328. When there are several modes of performing a contract, the defence of impossibility cannot be set up as long as any one of these is open.<sup>1</sup> The alternative that is possible must be pursued,<sup>2</sup> unless the alternative be so remote as apparently not to have been within the intention of the parties.<sup>3</sup> The same rule applies to bonds with alternative conditions.<sup>4</sup> Where a lessee of coal mines covenanted to raise a certain amount of coal each year and pay a royalty, or to pay a fixed sum as rent whether the coal was produced or not, the rent was held due though the mine was worked out.<sup>5</sup>

§ 329. As in our modern practice the condition of a bond expresses the real indebtedness of the obligor to the obligee, the penalty being merely cautionary, if the condition turns out subsequently to be impossible, the bond itself is void. The obligation is dependent on the condition, and when the condition falls, the obligation falls.<sup>6</sup> Hence, when the law of the place to which a recognizance of bail is subject, by imprisoning the principal, makes his delivery by the bail impossible, the recognizance ceases to be obligatory.<sup>7</sup> And generally the bond is subject to the rules heretofore presented as controlling contracts to do things which subsequently become impossible. On the other hand,

tiff on the Pacific side was burned, without any fault or negligence of the defendant or his servants. It was held that this was no defence to the plaintiff's suit, based on the damage sustained by him through his detention at Panama, since the defendant could have obtained, though it may have been with great difficulty, another ship.

<sup>1</sup> Leake, 2d ed. 716; *infra*, § 624; see *The Teutonia*, L. R. 4 P. C. 171; *Jones v. Holm*, L. R. 2 Ex. 335.

<sup>2</sup> *Barkworth v. Young*, 4 Drew, 1; *Da Costa v. Davis*, 1 B. & P. 212; *Williams v. Vanderbilt*, 28 N. Y. 217, and cases cited, *infra*, § 624.

<sup>3</sup> *Barkworth v. Young*, 4 Drew, 1. See *Erie R. R. v. Express Co.*, 6 Vroom, 240.

<sup>4</sup> *Mill Dam Foundry v. Hovey*, 21 Pick. 417.

<sup>5</sup> *Bute v. Thompson*, 13 M. & W. 487.

<sup>6</sup> *Infra*, § 547, where the authorities are given at large; 1 Wms. Saunders, 238; *Brown v. Mayor of London*, 9 C. B., N. S. 726; *Poussard v. Spiers*, 1 Q. B. D. 410; *People v. Bartlett*, 3 Hill, 570; *Scully v. Kirkpatrick*, 79 Penn. St. 324; *Mizell v. Burnett*, 4 Jones N. C. 249. If the non-possibility arise from the obligor's act, it cannot be set up as a defence. *Beswick v. Swindells*, 3 A. & E. 881. See *supra*, § 325.

<sup>7</sup> *Taylor v. Taintor*, 16 Wall. 366; *Way v. Wright*, 5 Met. 380; *Fuller v. Davis*, 1 Gray, 612; see *supra*, §§ 307, 321.

it is laid down in the old books that when the condition is on its face impossible, then the obligation is absolute.<sup>1</sup> But supposing both parties knew of the impossibility of the condition, the obligation, on the reasoning already given, cannot be regarded as operative.<sup>2</sup>

§ 330. So far as concerns even a non-culpable vendor, partial impossibility constitutes no defence. He has contracted for a specific price to sell a particular thing. Events for which he is not responsible prevent him from selling more than a part of this thing. If the value can be proportionally assessed, he cannot complain if he is compelled to deliver that which he is capable of delivering at its proportionate price. To this he is bound. It is otherwise with the purchaser. If he knew at the time of the contract that it could only be partially performed, then we have a right to assume that he expected to obtain only so much of the thing contracted for as could be delivered. This, however, cannot be supposed in cases where he was ignorant of this partial impossibility. It by no means follows that because he wanted the whole, therefore he wanted a part. In many cases a part would be useless without the whole; in no case can it be assumed to be the object of a contract when the whole is contracted for. At the same time there may be cases in which the part which it is impossible to deliver is so insignificant that we may hold that the contract is not dependent upon its delivery.<sup>3</sup> In our own law,

Partial impossibility  
a defence  
*pro tanto*.

<sup>1</sup> Pollock, *op. cit.*, 377, citing Co. Lit. 206, b; Shepp. Touch. 373. See Hughes v. Edwards, 9 Wheat. 489.

<sup>2</sup> See *supra*, § 30.

<sup>3</sup> See *infra*, §§ 579, 605, 716, 899.

The following passage in the Pandects is given by Mommsen (p. 164) as the leading authority on this topic: L. 57, D. de contr. empt. (18, 1), Paulus I. 5, ad Plautium. "Domum emi, cum eam et ego et venditor combustam ignoraremus—Nerva, Sabinus, Cassius, *nihil venisse quamvis area maneat*; pecuniamque solutam condici posse ajunt. Sed si *pars domus maneret*,

Neratius ait, hanc questionem multum interesse, quanta pars domus incendio consumptae permaneat; ut si quidem amplior domus pars exusta est, non compellatur emptor perficere emptiorem; sed etiam, quod forte solutum ab eo est, repetet. Sin vero vel *dimidia pars*, vel *minor* quam dimidia exusta fuerit, tunc *coartandus est emptor venditionem adimplere*, aestimatione viri boni arbitrato habita, ut quod ex pretio propter incendium de crescere fuerit inventum, ab hujus praestatione liberetur.—§ 1. Sin autem *venditor* quidem sciebat domum esse exustam, *emptor*

when a consideration is incapable of division, if a part performance is impossible, then, the whole consideration falling,

autem ignorabat, nullam venditionem stare, si tota domus ante venditionem exusta sit: si vero quanta cumque pars aedificii remaneat, et stare venditionem et venditorem emptori quod interest restituere. § 2. Similique modo ex diverso tractari oportet, ubi emptor qui dem sciebat, venditor autem ignorabat; et hic enim oportet, et venditionem stare, et omne pretium ab emptore venditori, si non depensum est, solvi: vel, si solutum sit, non repeti. § 3. Quod, si uterque sciebat, et emptor et venditor, domum esse exustam totam, vel ex parte, nihil actum fuisse, dolo inter utramque partem compensando: et iudicio, quod ex bona fide descendit, dolo ex utraque parte veniente, stare non concedente."

In this extract we have considered several aspects of the question of impossibility of performance through the burning of a house contracted to be sold. The following conditions are presented:—

1. The house is *wholly* consumed. But the impossibility of performance is only partial, as the *area* remains: "*quamvis area maneat.*" Nevertheless the case is treated as one of entire impossibility. The will of the purchaser is supposed to have been directed to the purchase of the *house*; the *area* is not his object, but the *building*. The contract, therefore, is invalid, not only where both parties were ignorant of the fire, but where the vendor knew it, but fraudulently concealed his knowledge.

2. The burning is but *partial*. Here the following distinctions are noticed by Mommsen:—

(a) Both parties are ignorant of the burning. If more than half is burned, then the purchaser cannot be com-

pelled to execute the contract. He has the choice of throwing it up or of confirming it. If he elects the former course, he can recover the part of the purchase-money he has paid; nor can he, according to the Roman law, be indemnified for any loss he may have sustained in the transaction. If, however, he elects to confirm the contract, then he is entitled to a proportionate abatement of the price. If half only, or less than half, is burned, then the contract is held to be in force, the price being proportionally abated.

(b) If the vendor alone knew that the house could not be delivered complete in consequence of the burning, the contract binds him so far as concerns the part of the house that remains; the purchaser is entitled to possession, with damages to compensate him for the loss of the part whose destruction was not communicated to him. The vendor has fraudulently concealed this partial burning. Had the purchaser known it, he either would not have made the purchase, or would have made it at a less price. And at the same time the purchaser has a right to call for a rescission of the entire contract on the ground of fraud.

(c) Had the purchaser alone information of the burning, the contract would be binding so far as concerns the purchaser, who is compellable to pay the whole price. The case, it should be remembered, is that of a partial burning. The supposition in such case is that the purchaser, being aware at the time of the partial burning, had his eye fixed, for the purpose of purchase, on the building as thus partially dilapidated. And though it is possible that he may have had other

the contract will not be enforced.<sup>1</sup> It is otherwise when the contract is divisible.<sup>2</sup> Thus a master of a vessel who has agreed to

views, yet, if he suppressed the fact of which he was cognizant, he cannot afterwards take advantage of this suppression. But this only applies to a *partial* burning. If the building was wholly burned, and the purchaser was cognizant of the fact, and the object was simply possession of the building, then the whole contract falls for want of consideration. And in any view the vendor is bound, in all cases of partial burning falling under this head, to deliver, if required, to the purchaser the area with the remaining portion of the building.

(d) Both parties knew that the house was consumed. (L. 57, § 3.) Here the contract is invalid throughout. Even if each party concealed his knowledge of the fact from the other, his fraud cannot give him a right of action. This conclusion, however, does not apply in cases where a part of the building is spared, and is the real object of the contract.

Another passage is as follows:—

L. 58, D. de contr. empt. Papin. (1-10). Quaest, "Arboribus quoque vento dejectis, vel absumptis igne dictum est, emptionem fundi non videri esse contractam, si contemplatione illarum arborum, veluti oliveti, fundus comparabatur; sive sciente, sive ignorante venditore: sive autem emptor sciebat vel ignorabat, vel uterque eorum, *haec optinent, quae in superioribus casibus pro aedibus dicta sunt.*"

This is the case of the sale of a nursery-garden in which the trees were as much the principal object of

the bargain as the *superficies* in the bargain of the sale of the *superficies*. Such being the view of the parties, it follows that, when the trees are blown down or burned after the closing of the contract, the same rule is applied as in the former case of the burning of the house.

It should be observed also that the ruling in respect to the burned house is to be limited to the particular state of facts. A house partially burned may be rapidly restored. There may, however, be cases where a destruction of a fraction may be really the destruction of the whole; and to such cases the ruling before us does not apply. There may also be cases in which restoration is impossible, as where a picture by an old master is partially burned. In such cases it would be absurd to talk of measurement as a mode of determining whether the purchaser continues bound by the bargain; the true test is the relation sustained in value to the whole by the part whose delivery is still possible. And, in addition, it is essential to determine what is the primary object of the contract. If this can be effected, impossibility of performing a trivial and comparatively insignificant condition does not affect the validity of the contract, though it may touch the question of price.

When the contract relates to a plurality of things, impossibility to deliver one of these things is determined by the rules above stated in all cases in which that thing was the principal object in executing the contract. If, however, the impossibility of delivery

<sup>1</sup> *Infra*, §§ 579, 580, 714, 899; *Adlard v. Booth*, 7 C. & P. 108; *Lord v. Wheeler*, 1 Gray, 282.

<sup>2</sup> *Howell v. Coupland*, L. R. 1 Q. B. D. 258; *supra*, §§ 313-4.

load the vessel in a foreign port at a stipulated freight, but who is prevented by causes beyond his control from obtaining a complete cargo, can recover the freight earned by the cargo he carried.<sup>1</sup> And in case of part performance of a divisible contract of sale, the unperformed part of the contract having become impossible, the defendant is entitled to recover the proportion of the contracted price, subject to such abatement as is required by the imperfection of the work as completed.<sup>2</sup>

§ 331. It may be that the impossibility presents an impediment that can never be removed, as where there is a contract to deliver a thing which never can exist. On the other hand, the impossibility may be only temporary, as where the contract is to sell a thing on which there is a temporary embargo.<sup>3</sup> On this question subtle distinctions have been taken in the Roman law. In the first place are distinguished those cases in which the parties, at the time of the completion of the contract, took no notice of the probable future cessation of the impossibility. On this point two opposite theories may be noticed.<sup>4</sup> We may on the one side hold to the nullity of all transactions which, at the time of contracting, cannot possibly be performed; or we may, on the other side, hold that only those transactions are null in which the impossibility of performance is permanent. But the first of these hypotheses cannot be accepted. Even supposing that the parties were at the time ignorant of the temporary hindrance in their way, we have no right to assume as a rule that the contract would not have been made by them had they been aware of the hindrance. The vendee, for instance, in a case of sale, may find it far better for him to obtain the article he desires, though later than he expected, than it would be to lose it altogether; the vendor cannot complain if the delivery is not exacted from him until after the period first designated by him. Yet

relates to subordinate accessory articles, then, when the parties were at the time of the contract ignorant of the impossibility, the contract stands with an abatement of price.

<sup>1</sup> *Ritchie v. Atkinson*, 10 East, 295; *supra*, §§ 313-4.

<sup>2</sup> See *Thornton v. Place*, 1 Moo. & R. 218; *Mondel v. Steel*, 8 M. & W. 570; *Stewart v. Fulton*, 31 Mo. 59. As to divisibility, see *supra*, § 233; *infra*, §§ 338, 511, 552, 899.

<sup>3</sup> See *supra*, § 319.

<sup>4</sup> *Mommsen*, op. cit. 143.



to the hypothesis that the nullity of the transaction cannot be pronounced until the impossibility is determined to be absolute and final, there are also serious objections. The question of the validity of many contracts will remain in abeyance until some often remote contingencies are settled. The intention of the parties usually is that the transaction in which they are engaged shall be either at once consummated or at once abandoned, so that their hands should be free for other engagements; but this intention would be defeated if they should be tied up by a suspended contract until some distant future event shall determine whether they are bound or free. It is not good, also, for the business community that negotiations of this class should be kept in this condition of paralysis. To avoid the difficulties inherent in both these opposing theories, the Roman jurists hit upon an intermediate view which is expressed in the following passages: § 2. L. de inut. stip. (3, 19). "Idem juris (aeque inutilis) est (stipulatio), si rem sacram aut religiosam, . . . vel publicam, quae usibus populi *perpetuo* exposita sit, . . . vel liberum hominem, quem servum esse credebat, vel cujus commercium non habuerit, vel rem suam dari quis stipuletur. Nec in pendent erit stipulatio ob id, quod publica res in privatum deduci, et ex libero servus fieri potest, et commercium adipisci stipulator potest, et res stipulatoris esse desinere potest: sed protinus inutilis est."—L. 83, § 5, D. de V. O. (45, 1), Paul. I. 72 ad edict. "Sacram, vel religiosam rem, vel usibus publicis *in perpetuum relictam*, ut forum, aut basilicam, aut hominem liberum, *inutiliter* stipular; *quamvis sacra profana fieri, et usibus publicis relictam in privatos usus reverti, et ex libero servus fieri potest.*"

From these rulings we may infer, argues Mommsen,<sup>1</sup> that on the one side the mere possibility of a future removal of an impediment does not validate an impossible contract, and on the other side that the contract will not be a nullity when the impediment is merely transient. Thus it is expressly declared that the promise of a *res publica* is void only in those cases in which the thing promised is devoted "in perpetuum" to pub-

<sup>1</sup> Op. cit. 145.

lic use. And this view is still more distinctly asserted in the following: L. 35, § 1, D. de V. O. (45, 1) Paulus I. 12 ad Sabin. "Item, quod leges fieri prohibent, si *perpetuam causam servaturum est*, cessat obligatio."

We have, then, to distinguish between transient and permanent impediments, and as to the line to be here drawn some differences of opinion exist. Savigny<sup>1</sup> holds that permanent impossibility cannot be assumed in cases in which the possibility of the event in question may be looked upon as something within the range of ordinary expectation. Mommsen<sup>2</sup> holds, on the other hand, that to make impossibility of performance a ground of nullity, such impossibility must be of a permanence which is continuous. A mere temporary inhibition of sale, therefore (*e. g.* an embargo), would not fall within this category; though it would be otherwise with a permanent inhibition (*e. g.* in case of laws prohibiting the sale of intoxicating or poisonous liquors or drugs). When, also, an obligation depends upon the co-operation of a particular person, his temporary sickness would not annul the contract, though it would be otherwise with his permanent insanity.—What has been said applies only to those cases in which the contract contains no provisions as to its efficiency in case of the removal of an intervening impediment. It is competent for the parties to provide that certain things shall be done on the removal of an impediment which is on its face continuous, provided the contingency of such removal be not absolutely impossible, and provided that the contract is not against good morals, as is a contract to sell goods whose sale the state, on grounds of policy, prohibits.<sup>3</sup>

<sup>1</sup> Syst. III. p. 167.

<sup>2</sup> Op. cit. 147.

<sup>3</sup> See as to effect of war in suspend-

ing operation of contract, *supra*, § 305, *infra*, § 476.

## CHAPTER XV.

## ILLEGALITY.

## I. GENERAL PRINCIPLES.

Unlawfulness and indictability not convertible, § 335.

Void contracts distinguished from illegal, § 336.

Where a contract is susceptible of an illegal and a legal construction, the latter is to be adopted, § 337.

Illegal stipulations may be severed from legal, § 338.

Divisibility of insurances, § 338 *a*.

Concurrence of other considerations no defence, § 339.

Party to illegal agreement cannot sue on it, § 340.

So of money contributed to illegal purposes, § 341.

And of price of goods contributed to illegal purposes, § 342.

Mere knowledge that supply goes to illegal purpose does not preclude recovery, § 343.

Complicity and illegality may be inferentially shown, and by preponderance of proof, § 344.

No distinction as to turpitude of offence, § 345.

Complicity in collateral matters not to be imputed, § 346.

Illegality does not attach *in rem*, or to parties without notice, § 347.

Landlord cannot recover rent of house to be illegally used, § 348.

Partnership in illegal enterprise will not be enforced, § 349.

Insurances on illegal voyages are void, and so of illegal sales, § 350.

Subsequent securities infected with illegality, § 351.

Executed contract cannot be overhauled on account of illegality, § 352.

Complicity does not bar dupes or victims, § 353.

Money paid on executory illegal agreement may be recovered back, § 354.

Goods deposited for an illegal purpose may be recovered back, § 355.

But not when the mere supply was a crime, § 356.

Agent cannot hold back from principal on the ground that transaction was illegal, § 357.

## II. VIOLATION OF STATUTE.

Contract to violate statute is illegal, § 360.

In conflict *lex loci solutionis* prevails, § 361.

Evasions of statute invalidate, § 362.

Not necessary that penalty should be prescribed, § 363.

Mere penalty imposed does not make contract illegal, § 364.

Otherwise when act is made unlawful, § 365.

Party protected by statute may sue, § 366.

Agreement cannot be made unlawful by subsequent legislation, or change of judicial opinion, nor can it be validated by subsequent legislation, § 367.

Void contract cannot be validated, § 368.

### III. IMMORALITY.

Agreements to induce immorality void, § 370.

So of immoral agreements amounting to indictable conspiracies, § 371.

So as to agreements for libels, § 372.

So as to agreements for illicit cohabitation, § 373.

So as to goods or houses furnished for immoral purposes, § 374.

### IV. CHEATING AND FRAUDULENT INSOLVENCY.

Agreement to defraud void, § 376.

Conditions of voidability on ground of fraud, § 377.

Contract of agent to his private profit void against principal, § 378.

Agreements in fraud of bankrupt law void, § 379.

Agreements in insolvency for preferences void, § 380.

### V. VIOLATION OF SUNDAY LAW.

Sunday contracts in some states void, § 382.

Statutes do not affect executed contract, § 383.

So as to Sunday transfer of property, § 384.

When statute relates to "ordinary" calling it does not invalidate collateral contracts, § 385.

Indorsee without notice not bound, § 386.

Parties dealing *bona fide* protected, § 387.

Exceptions to be liberally construed, § 388.

Sunday contracts cannot be ratified, § 389.

Date may be corrected by parol, § 390.

Duration of Sunday determined by statute, § 391.

### VI. INTERFERENCE WITH FAMILY RELATIONS.

Agreements modifying marriage are void, and so are agreements for divorce, § 394.

Agreements providing for separation void, § 395.

Contracts in restraint of marriage void, § 396.

Partial limitations may be valid, § 397.

Marriage brokerage contracts void, § 398.

Marriage settlement in fraud of marital rights will be set aside, § 399.

Father cannot divest himself of custody of children, § 400.

### VII. INJURY TO PUBLIC SERVICE.

Agreement privately to influence legislature invalid, § 402.

And so of agreement to influence executive, § 403.

Professional services as to pardon permissible, § 404.

Agreements to influence public officers void, § 405.

And so of agreements to bribe voters, § 406.

So of sales of public offices, § 407.

So of sales of trusts, § 408.

So of agreements by administrators to give preferences, § 409.

Agreement to withdraw from contesting election void, § 410.

So of assignments of salary, § 411.

Otherwise as to pensions, § 412.

Agreement by public officers to receive private payment invalid, § 413.

Railroad bargains as to stations may be invalid, § 414.

Agreement to obstruct justice void, § 415.

Condition not to have recourse to law void, § 416.

So as to agreement to finally arbitrate, § 417.

### VIII. CHAMPERTY AND MAINTENANCE.

Champerty is illegal sharing of profits of litigation, § 421.

Maintenance is stirring up of unfounded litigation, § 422.

Agreement to sell claims on shares not invalid, § 423.

Purchase on speculation of suit void, § 424.

Parties jointly interested may bind themselves to expenses of litigation, § 425.

Attorney cannot purchase client's interest, § 426.

Agreement for contingent fees not necessarily invalid, § 427.

Barrister can recover for services, § 428.

Objection of maintenance cannot be set up by stranger, § 429.

#### IX. RESTRAINTS OF TRADE.

Agreement to surrender inalienable rights is void, § 430.

Agreement binding party not to do business in a particular place may be sustained, § 431.

No objection to such agreement that it is unlimited as to time, § 432.

Reasonableness of restraint is a question of law, § 433.

Must be valuable consideration, § 434.

Party may be enjoined for breach of trust, § 435.

Patent rights and secret processes may be sold without limitation, § 436.

Parties may bind themselves to deal exclusively with each other, and employee may bind himself to give his whole services to employer, § 437.

Agreements relieving from liability for negligence are void, § 438.

Agreements limiting prices of labor void, § 439.

Agreement not to labor except at a certain price, or for a particular person, is invalid, § 440.

And so of combination of employers, § 441.

Agreement to absorb a staple, or to fix prices, invalid, § 442.

And so of agreement to absorb transportation, § 442 *a*.

Agreement to suppress bids at auction and public proposals void, § 443.

Agreement to make joint bids not invalid, § 444.

Foreign revenue laws will not be enforced, § 445.

Intended invasion of home revenue laws does not vitiate contract when this is not the consideration, § 446.

#### X. WAGERS AND GAMBLING.

Wagers on matters which ought not to be investigated are illegal, § 449.

And so of wagers on matters which it is against the policy of the law to have acted on, § 450.

By statute wagers are illegal, § 451.

In this country tendency is to hold all wagers illegal, § 452.

A contract to purchase stocks or other chattels without intention of delivering is void, § 453.

"Options" not necessarily illegal, § 453 *a*.

Otherwise as to "corners," § 453 *b*.

Securities given for gaming debts void, but money paid cannot be recovered back — price of gambling material, § 454.

By statute marine insurance without interest void, § 455.

So of insurances of life, § 456.

And so of fire insurances, § 457.

Contracts based on lotteries illegal, § 458.

#### XI. USURY.

Usury laws local, and to be strictly construed, § 461.

Between conflicting laws, that least onerous is to be applied, § 462.

Law of place of performance controls, § 463.

Mistake in fact will not avoid contract, otherwise as to mistake in law, § 464.

Stranger cannot avail himself of statute, § 465.

Contract not in itself valid not affected by subsequent usurious receptions, § 466.

Statute cannot be evaded by disguising or reconstructing loan, § 467.

Statutes do not apply to any transactions but loans, § 468.

Borrower in usurious contract cannot defend without doing equity, § 469.

Question one of exaction, not of payment, § 470.

## XII. TRADING WITH ENEMY; BREACH OF NEUTRALITY.

Trading with public enemy void at common law, § 473.

Rule applicable to belligerent insurgents, § 474.

License validates trade with enemy, § 475.

Contract suspended during hostilities, § 476.

Insurance of enemy's ship and goods illegal, § 477.

Alien enemies cannot sue during war, § 478.

Contracts for breach of neutrality void, § 479.

Contracts to run foreign blockades not illegal, § 480.

## XIII. COMPOUNDING OFFENCES.

Contracts to compound offences void, § 483.

Distinction between felonies and misdemeanors obsolete, § 484.

Approval of magistrate does not legalize, § 485.

Settlement of private suit not precluded by the fact that criminal prosecution lies for same act, § 486.

Question dependent upon local law of *nolle prosequi*, § 487.

Criminal prosecutions should not be used for collection of debts, § 488.

## I. GENERAL PRINCIPLES.

§ 335. As is elsewhere shown,<sup>1</sup> immorality and indictability are not convertible terms, since there are many immoral acts which are not indictable, and some indictable acts which are not immoral. We may also say that unlawfulness (meaning by unlawfulness exclusion from legal aid) and indictability are not convertible, since there are in this sense many unlawful acts which are not indictable. Cheats by false pretences, for instance, are not indictable at common law; yet no one would pretend to say that a person cheating another by false pretences could recover at common law the fruits of his fraud. So fornication is not indictable at common law, yet at common law no suit lies to recover the price of fornication. "A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it."<sup>2</sup> And as we will hereafter see more fully, it is not necessary to

<sup>1</sup> Wh. Cr. L. 8th ed. § 14 a.

L. R. 2 Ex. 236; adopted Pollock, 3d

<sup>2</sup> Bramwell, B., *Cowan v. Milbourne*, ed. 250.

make an act unlawful, that a penalty should be imposed on its commission.<sup>1</sup>

§ 336. A *void* contract is to be distinguished in this respect from an *illegal* contract. Money paid in furtherance of an illegal contract cannot be recovered back.<sup>2</sup> But it is otherwise as to money paid in furtherance of a contract which by statute is void, but not illegal;<sup>3</sup> as is the case with contracts void under the statute of frauds.<sup>4</sup> An *illegal* contract may be repudiated by either party;<sup>5</sup> though a court of equity may impose terms on a party seeking to set aside a contract on the ground of illegality.<sup>6</sup> But as a rule, no case, either when presented by way of suit, or of set-off, or of defence, can be sustained on an illegal agreement.<sup>7</sup>

Void contract is distinguished from illegal.

§ 337. It is not to be supposed that the parties to a contract intend in making it to violate the law;<sup>8</sup> and, hence, "where a contract is capable of two constructions, the one making it valid and the other void, it is clear law that the first ought to be adopted."<sup>9</sup>

Where a contract is susceptible of an illegal and a legal construction, the second is to be adopted.

§ 338. When there are several stipulations in a particular agreement, the fact that one of these stipulations is illegal does not defeat a recovery on the other, when

Illegal stipulations

<sup>1</sup> *Infra*, § 363. That agreements against public policy are void, see *infra*, §§ 394 *et seq.*; *Tracy v. Talmage*, 14 N. Y. 162; *Hull v. Ruggles*, 56 N. Y. 424; *Stropes v. Board*, 72 Ind. 42.

<sup>2</sup> *Infra*, §§ 340, 341.

<sup>3</sup> *Leake*, 2d ed. 763; *Jessopp v. Lutyche*, 10 Ex. 614; *Rosewarne v. Billing*, 15 C. B. N. S. 316. As to distinction between "void" and "voidable," see *supra*, § 28.

<sup>4</sup> *Pawle v. Gunn*, 4 Bing. N. C. 445.

<sup>5</sup> *Cowan v. Millbourn*, L. R. 2 Ex. 230.

<sup>6</sup> *Cork, etc. R. R. in re*, L. R. 4 Ch. 762; see *infra*, § 340.

<sup>7</sup> *Leake*, 2d ed. 771; *Thomson v. Thomson*, 7 Ves. 470; *Fivaiz v. Nich-*

*olls*, 2 C. B. 501; *Begbie v. Phosphate Co.*, L. R. 10 Q. B. 491; *Taylor v. Chester*, L. R. 4 Q. B. 314; and cases cited *infra*, §§ 340.

<sup>8</sup> *Infra*, § 655; *Wh. on Ev.* § 1249; *Lewis v. Davison*, 4 M. & W. 654; *Mittelholzer v. Fullerton*, 61 Q. B. 989, 1022; *Richards v. Bluck*, 6 C. B. 441; *Marsh v. Whitmore*, 21 Wall. 178; *Kellogg v. Miller*, 2 McCrary, 395; *Foster v. Rockwell*, 104 Mass. 167; *Lorillard v. Clyde*, 86 N. Y. 387; *Bessent v. Harris*, 63 N. C. 542.

<sup>9</sup> *Erle, J., Mayor of Norwich v. R. R.*, 4 E. & B. 397; *Kenton Co. v. Bank Lick Co.*, 10 Bush, 529. See for other cases, *infra*, § 655.

may be severed from legal. the stipulations are divisible, and the consideration is not as a whole illegal.<sup>1</sup> In other words, "in cases where the consideration is tainted by no illegality, but some of the conditions or promises are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another."<sup>2</sup> *A fortiori*, when a transaction is separated by the parties into two agreements, one legal and the other illegal, the legal agreement can be enforced, and the transaction *pro tanto* sustained.<sup>3</sup> It is otherwise where the stipulations, legal and illegal, are so interwoven that the legal cannot be sustained without sustaining the illegal.<sup>4</sup> "The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."<sup>5</sup>—So far as concerns the statute

<sup>1</sup> *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 16 M. & W. 346; *Bank of Australasia v. Breillat*, 6 Mo. P. C. 152; *Mayfield v. Wadsley*, 3 B. & C. 361; 5 D. & R. 228; *Kerrison v. Cole*, 8 East, 231; *M'Allen v. Churchill*, 11 Moore, 483; *Gelpke v. Dubuque*, 1 Wallace, 175; *Goodwin v. Clark*, 65 Me. 280; *Carleton v. Woods*, 28 N. H. 290; *Van Dyck v. Van Beuren*, 1 Johns. 362; *Leavitt v. Palmer*, 3 N. Y. 19; *Saratoga Bank v. King*, 44 N. Y. 87; *Hook v. Gray*, 6 Barb. 398; *Tracy v. Talnage*, 14 N. Y. 162; *Leavitt v. Blatchford*, 5 Barb. 9; *Lange v. Werk*, 2 Ohio St. 519; *Widoe v. Webb*, 20 Ohio St. 431; *Hynds v. Hayes*, 25 Ind. 31; *Kembrough v. Lane*, 11 Bush, 556; *Newberry Bank v. Stegall*, 41 Miss. 142; *Rosenblatt v. Townley*, 73 Mo. 536; *Valentine v. Stewart*, 15 Cal. 387. See *Mallan v. May*, 11 M. & W. 653; *Benj. on Sales*, § 505. That an illegal consideration vitiates see *infra*, § 509; and see *Carrigan v. Ins. Co.*, 53 Vt.

418, cited *infra*. As to divisibility in other cases see *supra*, § 233; *infra*, §§ 511, 552, 899.

<sup>2</sup> *Smith's L. C.* 7th Am. ed. 681.

<sup>3</sup> *Odessa Co. v. Mendel*, L. R. 8 Ch. D. 235.

<sup>4</sup> 1 Wms. Saund. 66, n. (4); *Waite v. Jones*, 1 Scott, 59; *Neuman v. Neuman*, 4 M. & S. 66; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *Ladd v. Dillingham*, 34 Me. 316; *Woodruff v. Hinman*, 11 Vt. 592; *Saratoga Bank v. King*, 44 N. Y. 87; *Rose v. Truax*, 21 Barb. 361; *Donallen v. Lenox*, 6 Dana, 91; *Langdon v. Gray*, 52 How. N. Y. Pr. 387; *Frazier v. Thompson*, 2 Watts & S. 235; *Tobey v. Robinson*, 99 Ill. 222. That when the consideration is illegal this vitiates the contract, see *infra*, § 509.

<sup>5</sup> *Willes, J.*, in *Pickering v. R. R.*, L. R. 3 C. P. 250 (adopted in *Leake*, 2d ed. 781), citing *Maleverer v. Redshaw*, 1 Mod. 35; *Collins v. Blantern*, 2 Wils. 351; *Gelpke v. Dubuque*, 1



of frauds the same test is applied. When part of a contract is invalidated by that statute, and the contract is severable, then the invalidation is only *pro tanto*; though it is otherwise when the contract cannot be severed.<sup>1</sup> Thus, where C., having contracted to do certain work for E., but the work being suspended on account of failure on E.'s part to pay, and T. having asked C. to finish the work promising to pay him in full, it was held that C. could recover from T. for the work done after the promise, but not for that done before the promise.<sup>2</sup> And generally the fact that a deed contains powers or conditions that are illegal, does not avoid the deed unless these powers or conditions qualify the whole conveyance. If they are independent, and can be severed without injuring the contract, their illegality does not vitiate the other portions of the deed.<sup>3</sup>—It is said by Mr. Pollock,<sup>4</sup> that where any part of the consideration for a promise or set of promises is unlawful, the whole agreement is void. This undoubtedly holds good in cases in which the unlawful consideration permeated the whole contract, as where, for instance, as in the case put in the next section, the consideration of a promise (or a series of promises) is (1) illicit cohabitation, and (2) the securing the services of a housekeeper. But it is otherwise where the illegal consideration does not permeate the whole contract. Supposing, for instance, A. agrees to pay B. \$100 for goods sold, part being sold on Sunday and part on a Monday. Now, for the Monday sale the vendee could have a decree of specific performance; and if so, the fact that the transaction was turned into a common account with the Sunday sale, is no reason why the vendor, who would be liable in this suit for specific performance, should not be entitled to his remedy for the Monday sale

Wall. 221; U. S. v. Bradley, 10 Pet. 343; Deering v. Chapman, 22 Me. 488; Roby v. West, 4 N. H. 285; Coburn v. Odell, 30 N. H. 540; Woodruff v. Hinman, 11 Vt. 592; S. P. Frazier v. Thompson, 2 Watts & S. 235; Raguet v. Roll, 7 Ohio, 76; Everhart v. Puckett, 73 Ind. 409; Anderson v. Powell, 44 Iowa, 20; McBratney v. Chandler, 22 Kan. 692.

<sup>1</sup> Mayfield v. Wadsley, 3 B. & C. 361; S. C., 5 D. & R. 228; Lexington v. Clarke, 2 Vern. 223.

<sup>2</sup> Rand v. Mather, 11 Cush. 1.

<sup>3</sup> Pickering v. R. R., L. R. 3 C. P. 235; Payne v. Brecon, 3 H. & N. 572; Greenwood v. Bp. of London, 5 Taunt. 727.

<sup>4</sup> 3d ed. 338.

against the vendee. And it is hard, also, to see why this right to recover for the Monday sale should be affected by the fact that the vendor took for both transactions, embracing the Sunday sale and the Monday sale, a single note. Undoubtedly, part of the consideration is illegal; but if the vendee, on the untainted part of the transaction, could sue the vendor, so can the vendor sue the vendee. And there is high authority to this effect. Thus, in Pennsylvania, no action, by statute, can be sustained upon a note given for a tavern reckoning exceeding twenty shillings; but if a note beyond that amount covers other items of lawful indebtedness, there can be a recovery for the latter items.<sup>1</sup> And when a note is founded on several considerations, each fixed by a separate contract, the note is valid to the extent of the lawful consideration.<sup>2</sup> And when a note has been given in part payment of an account, it is no defence that part of the account was illegal, if the amount of the note is less than the amount of the legal part of the account.<sup>3</sup>—A contract may be fraudulent or otherwise illegal as to the parties, yet bind as to third persons innocently taking title under it.<sup>4</sup> And a contract may be divisible so as to be bad as to the parties, but good as to strangers acting *bona fide* on it.<sup>5</sup>

§ 338 a. Whether an insurance policy, covering several Illustrated objects, one of which is illegal, is invalid *in toto*,

<sup>1</sup> Yundt v. Roberts, 5 S. & R. 139; Duchman v. Hagerty, 6 Watts, 65 (overruling Ogden v. Miller, 1 Bro. 147); Chase v. Burkholder, 18 Penn. St. 48.

<sup>2</sup> Frazier v. Thompson, 2 W. & S. 235; S. P. Hynds v. Hays, 25 Ind. 31; and see Warren v. Chapman, 105 Mass. 87. See *contra*, Deering v. Chapman, 22 Me. 488; Widoe v. Webb, 20 Oh. St. 431; overruling Doty v. Bank, 16 Oh. St. 133. Compare criticism of Mr. Wald, Wald's Pollock, 318. In Bixby v. Moor, 51 N. H. 402, it was held that there could be no *quantum meruit* recovery of wages when part of the work was illegal selling of liquor.

<sup>3</sup> Warren v. Chapman, 105 Mass. 87. In Carrigan v. Ins. Co., 53 Vt. 418, it was held that while an insurance of liquors for illegal sale is invalid, in a case where the assured was a druggist, and only a small proportion of the property insured was liquor, and nothing of illegality appearing in the contract, or in the design in entering into it, and the contract being collateral to the occasional acts of unlawful selling, it is not invalid; and the nature and purpose of the insurance should be submitted to the jury, whether collateral to, or in aid of, a violation of law.

<sup>4</sup> *Supra*, § 291; *infra*, § 352.

<sup>5</sup> Bradway's Est., 1 Ash. 212.

depends upon the construction of the policy. If it appear from the policy itself, or from extrinsic facts, that the insurer took the risk as a whole, it not being adequately shown that he would have granted a policy for the objects separately, then the contract must fall as a whole. In such case fraud as to one item of the insurance covered by the policy avoids the whole contract,<sup>1</sup> and so of material concealment as to one item,<sup>2</sup> and so of any misrepresentation that goes to the whole contract.<sup>3</sup> But a misrepresentation without fraud as to one article does not avoid as to others.<sup>4</sup> The question ought to be, in such cases, was there such fraud as pervades the whole transaction, or, if not, were the objects insured so interdependent as to make the representation made as to one an inducement for granting a policy on the other? If there be no fraud attempted, and if the objects insured are so independent of each other that a separate policy for each would probably have been granted if applied for, then it is hard to say why a misstatement as to one object should prevent a recovery for the others.<sup>5</sup>—So far as concerns avoidance by subsequent alienation, it may be held that where the premium is entire, and the objects insured are contiguous, subject to the same risks, an avoidance as to one of the objects avoids as to all; though it is otherwise when the objects are separately assessed and are not reciprocally dependent.<sup>6</sup> On a policy thus

<sup>1</sup> *Lovejoy v. Ins. Co.*, 45 Me. 472; *Gould v. Ins. Co.*, 47 Me. 403; *Gottsmann v. Ins. Co.*, 56 Penn. St. 210; *Moore v. Ins. Co.*, 28 Grat. 508, 524. See *Bowman v. Ins. Co.*, 40 Md. 620. To the same effect see *Cashman v. Ins. Co.*, 5 Allen, N. B. 246; *Clement's Ins. Dig.* 92.

<sup>2</sup> *Gore Ins. Co. v. Samo*, 2 Can. Sup. 411; *Friesmuth v. Ins. Co.*, 10 Cush. 587; *Smith v. Ins. Co.*, 25 Barb. 497; though see *contra*, *Lochner v. Ins. Co.*, 17 Mo. 247; 19 Mo. 620.

<sup>3</sup> *Bowman v. Ins. Co.*, 40 Md. 620; *Richardson v. Ins. Co.*, 46 Me. 394; *Barnes v. Ins. Co.*, 51 Me. 110; *Friesmuth v. Ins. Co.*, 10 Cush. 587; *Hin-*

*man v. Ins. Co.*, 36 Wis. 159; *Schurmilsh v. Ins. Co.*, 48 Wis. 26. See *May on Ins.* 2d ed. § 277, and discussion in 25 Alb. L. J. 224.

<sup>4</sup> *Phoenix Ins. Co. v. Lawrence*, 4 Met. Ky. 9; *Burrill v. Ins. Co.*, 1 Edm. Sel. Ca. 233; *Rowley v. Ins. Co.*, 3 Keyes, 557; *Koortz v. Ins. Co.*, 42 Mo. 126. But *Gottsmann v. Ins. Co.*, 56 Penn. St. 210, tends to the position that mere misrepresentation as to a single article avoids.

<sup>5</sup> To this effect see also *Koortz v. Ins. Co.*, 42 Mo. 126; *Daniel v. Robinson, Batty*, 650; *May on Ins.* §§ 189, 277; *Wood on Ins.* § 328.

<sup>6</sup> *Friesmuth v. Ins. Co.*, 10 Cush.

divisible, it has been held that subsequent alienation of a portion of the property insured, though in violation of a limitation of the policy, does not avoid it as to the property not alienated.<sup>1</sup> It is otherwise when the objects insured are interdependent.<sup>2</sup>—In New York, in 1878, where a policy covered \$6000, divided in specific insurance on buildings and several articles of personal property, it being provided that if the property should be incumbered by mortgage it should be void,

589. In this case the court said: “The contract of insurance on the part of the defendants was not distinct and separate on each class or subject embraced in the policy. It was separate and distinct so far only as to limit the extent of the risk assured by the defendants on each kind of property. In other respects it was an entire contract. This is manifest from the fact that the premium and deposit are designated as entire sums without any reference to the different kinds of property covered by the policy on the separate sums insured in each. There is nothing in the application or policy from which it can be ascertained how much of the deposit note was made up of the rate of insurance charged on the real estate, and how much of that on the personal property. The consideration of the contract was regarded by the parties as an entirety, of which they did not contemplate a separation or apportionment. It was in consideration of the entire sum for which the deposit note was given, and the liability of the assured to assessment on that amount in case of losses, that the defendants assumed all the risks contained in the policy. They had the right to look to their lien on each and all the different kinds of property insured by them for the security of the whole amount of the deposit notes.”

<sup>1</sup> *Quarrier v. Ins. Co.*, 10 W. Va. 507; *Commer. Ins. Co. v. Spankneble*, 52 Ill. 53.

<sup>2</sup> In *Fire Ass. v. Williamson*, 26 Penn. St. 196, there were three adjoining houses insured in one policy for a specified sum each, with a stipulation against the storing of gunpowder. In one of the houses gunpowder was subsequently stored. It was held that this vitiated the whole contract, which the court held was indivisible. “Although,” said Knox, J., “three buildings were insured, the contract was an entirety, and as the cause of the injury to the three buildings was identical, it is of no consequence whatever in which of the three it had its origin.” The loss occurred through the explosion of the gunpowder thus improperly stored. But had the buildings been separate, this reasoning would not apply. And the true ground of the decision in such case should be not the indivisibility of the contract, but the fact that the loss was attributable to the plaintiff’s negligence in not preventing his tenant from thus perverting the use of the building. As holding that the appropriation of one of several buildings to a hazardous prohibited use vitiates as to the whole, see *Lee v. Ins. Co.*, 3 Gray, 583; *Kimball v. Ins. Co.*, 8 Gray, 33; *Associated Firemen’s Ins. Co. v. Assum*, 5 Md. 165; and cases cited *May on Ins.* § 277; though it is admitted that it would be otherwise if there were two distinct policies. *Franklin Ins. Co. v. Brook*, 57 Penn. St. 74.

and where a mortgage was given covering the buildings, it was held that the contract was not entire, but was divisible; and that the breach of the condition did not apply to the items not embraced in the mortgage.<sup>1</sup> On the other hand, it has been held that a policy for "\$1000, say \$700 on books and \$300 on music," with the clause that if the assured should thereafter make any other insurance on the property the policy should be void, unless notice should be given, is vitiated throughout by a second insurance without notice as to any one of the items insured.<sup>2</sup>

§ 339. We have already seen that when fraudulent intention is proved, it is no defence that there were other motives more or less innocent prompting to the same act.<sup>3</sup> It is no reply, also, to a plea that a contract was illegal, that there were other considerations besides that which was illegal.<sup>4</sup> A contract to indemnify for publishing a criminal libel, for instance, is not relieved from illegality by the concurrence of other venial motives on the part of the person indemnifying;<sup>5</sup> and a contract for illicit cohabitation is not made any the less inoperative by the fact that the person contracted with is also engaged to act as housekeeper.<sup>6</sup> But, as we have already incidentally seen, where there are several concurrent promises which may be attached to the several parts of the consideration respectively,

Concurrence of other considerations no defence.

<sup>1</sup> *Merrill v. Ins. Co.*, 73 N. Y. 452; *Armstrong v. Toler*, 11 Wheat. 258; aff. 10 Hun, 428; *S. P. Holmes v. Drew*, 16 Hun, 491; *Dacey v. Ins. Co.*, 21 Hun, 83; *Clement's Ins. Dig.* 92. See *contra*, *Plath v. Ins. Co.*, 23 Minn. 479. See to the effect that alienation of one of several articles separately insured avoids the whole policy, *Baldwin v. Ins. Co.*, 10 Ins. L. J. 433.

<sup>2</sup> *Associated Ins. Co. v. Assum*, 5 Md. 165. To same effect see *Kimball v. Ins. Co.*, 8 Gray, 33.

<sup>3</sup> *Supra*, § 236.

<sup>4</sup> *Scott v. Gilmore*, 3 Taunt. 226; *Hopkins v. Prescott*, 4 C. B. 578; *Waite v. Jones*, 1 Bing. N. C. 662;

*Armstrong v. Toler*, 11 Wheat. 258; 4 Wash. C. C. 297; *Ladd v. Dillingham*, 34 Me. 316; *Prescott v. Norris*, 32 N. H. 101; *Bixby v. Moore*, 51 N. H. 402; *Woodruff v. Hinman*, 11 Vt. 592; *Dixie v. Abbott*, 7 Cush. 610; *Perkins v. Cummings*, 2 Gray, 258; *Ragnet v. Roll*, 7 Ohio, 77; *Donellen v. Lenox*, 6 Dana, 91; *Chandler v. Johnson*, 39 Ga. 85.

<sup>5</sup> *Shackell v. Rosier*, 2 Bing. N. C. 634; see *infra*, § 372.

<sup>6</sup> *R. v. Northwingsfield*, 1 B. & Ad. 912; see *Leake*, 2d ed. 779; and see *infra*, § 373.

then the promises may be severed, and a suit sustained on the promise to which a good consideration is attached.<sup>1</sup>

§ 340. A party to an illegal agreement, subject to the distinctions above stated and hereafter to be noticed, cannot use such agreement as the basis of a suit. "The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise<sup>2</sup> the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*."<sup>3</sup> "The policy of the law is to leave the parties in all such cases without remedy against each other;<sup>4</sup> but this is not as a protection to the defendant, but as a disability to the plaintiff."<sup>5</sup> And the "true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party."<sup>6</sup> Hence money contributed to an

<sup>1</sup> *Supra*, § 338; Leake, 2d ed. 780, citing *Mather ex parte*, 3 Ves. 373. See generally on the topic in the text, *Carleton v. Woods*, 28 N. H. 290; *Hinesburgh v. Sumner*, 9 Vt. 23; *Thayer v. Rock*, 13 Wend. 53; *Filson v. Himes*, 5 Barr, 452.

<sup>2</sup> That extrinsic proof is admissible for this purpose, see *Collins v. Blantern*, 1 Smith's L. C. 7th Am. ed. 667; *Reynell v. Sprye*, 1 D. M. G. 660, 672; *Totten v. U. S.*, 92 U. S. 105; and other cases cited Wh. on Ev. § 935.

<sup>3</sup> *Holman v. Johnson*, Cowp. 341.

<sup>4</sup> *Ames, J., Horton v. Buffinton*, 105 Mass. 400.

<sup>5</sup> *Myers v. Meinrath*, 101 Mass. 367.

<sup>6</sup> *Per cur.* in *Taylor v. Chester*, L. R. 4 Q. B. 314, adopted in Leake, 2d ed. 774; *Caldecott ex parte*, L. R. 4 Ch. D. 150; *Begbie v. Phos. Co.*, L. R. 10 Q. B. 491; L. R. 1 Q. B. D. 679. See to same effect, *Fivaiz v. Nicholls*, 2 C. B. 501; *Dixon v. Olmstead*, 9 Vt. 310; *Swan v. Scott*, 11 S. & R. 155; *Hipple v. Rice*, 28 Penn. St. 406; *Foote v. Emerson*, 10 Vt. 338; *Buck v. Albee*, 26 Vt. 184; *Myers v.*

illegal act cannot be recovered back;<sup>1</sup> nor can money advanced to carry out a fraud.<sup>2</sup> Payment to an agent, in pursuance of an executed agreement, is to be in this respect regarded as payment to the principal.<sup>3</sup>—It makes no matter by which party the bar of illegality is advanced. By whomsoever introduced into the case, it stops proceedings. Neither party can claim the aid of the law to enforce an illegal contract.<sup>4</sup> And hence goods conveyed on a resulting trust in fraud of creditors cannot be recovered back by the grantor from the grantee.<sup>5</sup> “The rule is that, in so far as the contract is executory, the defendant, although *in pari delicto*, or any one acquiring an interest in the property affected by the contract sought to be enforced, may set up the illegality of the consideration in defence.”<sup>6</sup> “Where parties are concerned in

Meinrath, 101 Mass. 367; Horton v. Buffinton, 105 Mass. 400; Sampson v. Shaw, 101 Mass. 145; Roll v. Raguet, 4 Ohio, 400; 7 Ohio, 76; Moore v. Adams, 8 Ohio, 372; Smart v. Cason, 50 Ill. 195; McLostey v. Gordon, 26 Miss. 260; Hoover v. Pierce, 27 Miss. 13.

<sup>1</sup> See cases to last note, and *infra*, § 741.

<sup>2</sup> *Infra*, § 376.

<sup>3</sup> Leake, 2d ed. 775; Tenant v. Elliott, 1 B. & P. 4.

<sup>4</sup> Boutelle v. Melendy, 19 N. H. 196; Buck v. Albee, 26 Vt. 184; Carroll v. Ins. Co., 8 Mass. 575; Sampson v. Shaw, 101 Mass. 145; Shaw v. Thompson, 105 Mass. 345; Perkins v. Savage, 15 Wend. 412; Burt v. Place, 6 Cow. 431; Cameron v. Peck, 37 Conn. 555; Hendricks v. Mount, 2 South. 738; Stewart v. Kearney, 6 Watts, 453; Scott v. Duffy, 14 Penn. St. 18; Bredin's App., 92 Penn. St. 241; Lynch's App., 97 Penn. St. 349; Cushwa v. Cushwa, 5 Md. 44; Spurgeon v. McElwain, 6 Ohio, 442; Spalding v. Bank, 12 Ohio, 544; Barton v. Morris, 15 Ohio, 408; McQuade v. Rosencrans, 36 Oh. St. 442; Gregory v. Wendell, 39 Mich. 337; Drexler v. Tyrrell, 15 Nev.

115; Bestor v. Wathen, 60 Ill. 138; Blackburn v. Bell, 91 Ill. 434; Harvey v. Tama Co., 53 Iowa, 228; Tyler v. Smith, 18 B. Mon. 793; Broughton v. Broughton, 4 Rich. 491; White v. Crew, 16 Ga. 416.

<sup>5</sup> Ellis v. Higgins, 32 Me. 34; Stone v. Locke, 46 Me. 445; Evans v. Her-ring, 3 Dutcher, 243; Getzler v. Saroni, 18 Ill. 511.

<sup>6</sup> Boynton, C. J., McQuade v. Rosencrans, 36 Oh. St. 448.

“As a general rule, a contract or agreement cannot be made the subject of an action if it be impeachable on the ground of dishonesty, or as being opposed to public policy, if it be either *contra bonos mores*, or forbidden by the law. In answer to an action founded on such an agreement, the maxim may be urged: *Ex maleficio non oritur actio*. A contract cannot arise out of an act radically vicious and illegal; those who come into a court of justice to seek redress must come with clean hands, and must disclose a transaction warranted by law; and it is quite clear that a court of justice can give no assistance to the enforcement of contracts which the law of the land has interdicted.” Broom's Legal Maxims, 734.

illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*," so is the rule stated by Judge Story,<sup>1</sup> "courts of equity, following the rule of law as to participators in a common crime, will not at present interpose to grant any relief; acting upon the known maxim, *in pari delicto potior est conditio defendentis, et possidentis*."<sup>2</sup>—And between degrees of turpitude, supposing the parties intelligently co-operate in the wrong, the courts will not distinguish;<sup>3</sup> though a party who is a dupe or a victim is not precluded from redress.<sup>4</sup> Nor does the fact that the defendant was equally implicated with the plaintiff in the illegality preclude him from setting up the defence.<sup>5</sup> Hence, money deposited as a "margin" cannot be recovered back in case of a fall in the price of the goods, when the deposit was known by both vendor and purchaser to be part of a gambling contract; though it would be otherwise, if the purchaser made the deposit in good faith, as part of a fair business transaction.<sup>6</sup>—It must, however, be remembered that money paid on a purely executory illegal agreement may be recovered back before overt act;<sup>7</sup> and so of goods deposited for illegal purpose not matured.<sup>8</sup>

§ 341. Money contributed to violate the *lex fori* cannot be recovered back when the money has been so applied.<sup>9</sup> But to bar such recovery, as will presently be seen more fully, the money must be given for the specific purpose. It is not enough that the party lending might have foreseen that the money would have been likely

So of money contributed to illegal purpose.

<sup>1</sup> Eq. Jur. 12th ed. § 298.

<sup>2</sup> See *Harrington v. Bigelow*, 11 Paige, 349; *Jones v. Gorman*, 7 Ired. Eq. 21; *Galt v. Jackson*, 9 Ga. 151; *Logan v. Gigley*, 11 Ga. 246.

<sup>3</sup> *Infra*, § 345.

<sup>4</sup> *Infra*, § 353.

<sup>5</sup> *Ibid.*; *Bayley v. Faber*, 5 Mass. 288; *Wheeler v. Russell*, 17 Mass. 258. See *Myers v. Meinrath*, 101 Mass. 367, where Wells, J., said: "In such cases the defence of illegality prevails, not as a protection to the defendant, but as a disability to the plaintiff."

<sup>6</sup> *Gregory v. Wendell*, 39 Mich. 337; see *infra*, § 453.

<sup>7</sup> *Infra*, § 354.

<sup>8</sup> *Infra*, § 355.

<sup>9</sup> *Infra*, § 741; *Cannan v. Bryce*, 3 B. & Ald. 253 (illegal stock jobbing, see *infra*, § 449); *Hamilton v. Grainger*, 5 H. & N. 40; *Pearce v. Brooks*, L. R. 1 Ex. 213; *U. S. v. Grossmayer*, 9 Wall. 72; *Sprott v. U. S.*, 20 Wall. 459; *White v. Buss*, 3 Cush. 448. Thus, a party cannot recover back money illegally paid a jailer to obtain the release of a prisoner without bail. *Smart v. Cason*, 50 Ill. 195.



to have gone to an illegal object, or that the person borrowing was engaged in illegal enterprises.<sup>1</sup> Nor will it be enough that there was an intention that the party borrowing should illegally appropriate the loan. He must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction.<sup>2</sup>—The rule precluding the recovery of money paid for illegal purposes applies to money paid over as the price of a fictitious claim intended by the parties to be fraudulently sold;<sup>3</sup> to money paid as the price of an illegal compromise of a prosecution, after the prosecution had been compounded in pursuance of the agreement;<sup>4</sup> and to money lost at illegal gaming or wagering, unless the plaintiff is a victim of fraud, or there is a statutory right given.<sup>5</sup>

§ 342. A party cannot recover the price of goods sold by him to further an illegal enterprise.<sup>6</sup> Thus a party cannot recover the price of beer sold by him for the purpose of unlawful retailing;<sup>7</sup> or the price of goods to be unlawfully exported;<sup>8</sup> or the price of drugs to be used in an unlawful manufacture;<sup>9</sup> or of goods to be used in an insurrection.<sup>10</sup> But it is not enough to defeat recovery that the party selling should have seen that it was probable that the goods would be in future illegally used, for if so, few sales of goods could stand.<sup>11</sup> It is necessary that the goods should be contributed for the express purpose of promoting the illegal design, and that the party selling should be implicated in this design.<sup>12</sup>

And of price of goods contributed to illegal purpose.

<sup>1</sup> *Infra*, § 343; Wh. Cr. L. 8th ed. §§ 154–5, 168.

<sup>2</sup> *Clarke v. Shee*, 1 Cowp. 197; *Smith v. Bromley*, 2 Doug. 698, n; *Waymell v. Reed*, 5 T. R. 599; *Oxford Iron Co. v. Spradley*, 46 Ala. 99; *Michael v. Bacon*, 49 Mo. 474; and cases cited *infra*, § 343.

<sup>3</sup> *Begbie v. Phosphate Co.*, L. R. 1 Q. B. D. 679; *infra*, § 744.

<sup>4</sup> *Goodall v. Lowndes*, 6 Q. B. 464; *infra*, § 483 *et seq.*

<sup>5</sup> *Thistlewood v. Cracroft*, 1 M. & S.

500; see *infra*, § 454, for further distinctions.

<sup>6</sup> *Lightfoot v. Tenant*, 1 B. & P. 551; *Bell ex parte*, 1 M. & S. 751; *Pearce v. Brooks*, L. R. 1 Ex. 213; *Craig v. Missouri*, 4 Pet. 410; *infra*, §§ 446, 473.

<sup>7</sup> *Brooker v. Wood*, 5 B. & Ad. 1052; *Briggs v. Campbell*, 25 Vt. 704.

<sup>8</sup> *Lightfoot v. Tenant*, 1 B. & P. 551.

<sup>9</sup> *Langton v. Hughes*, 1 M. & S. 593.

<sup>10</sup> *Hanauer v. Doane*, 12 Wall. 342.

<sup>11</sup> *Infra*, § 343.

<sup>12</sup> *Infra*, § 343; Wh. Cr. L. 8th ed. §§ 180–1, 1905.

§ 343. It has already been incidentally observed that mere knowledge of the illegality of the object to which money or supplies are to be appropriated does not necessarily vitiate the contract. It is true that an eminent English judge has declared it to be "settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied."<sup>1</sup> But this must be taken with some limitations. To furnish ammunition to a belligerent in violation of a neutrality statute is unquestionably illegal when the ammunition is directly forwarded to the belligerent; but the mere fact that a manufacturer of fire-arms knows that his fire-arms are likely to be used for belligerent purposes does not make it illegal for him to put them on the market.<sup>2</sup> It may be, also, that an importer of alcohol knows that a large proportion of alcohol sold by him will be illegally peddled; but this will not vitiate sales he may make to intermediate dealers. To annul a contract which promotes an illegal object, not only must there be knowledge that the object is illegal, but there must be complicity in the performance of an illegal act.<sup>3</sup>—It has been also said that "the agreement is void not merely if the unlawful use of the subject-matter is part of the bargain, but if the *intention* of the one party so to use it is known to the other at the time of the agreement."<sup>4</sup> It may be that a knowledge of the intention of the party supplied to use the supplies illegally is essential to put the party supplying in the position of a *particeps criminis*. But the mere knowledge of such intention will not by itself suffice for this purpose. The unlawful intention must have

<sup>1</sup> Pollock, C. B., *Pearce v. Brooks*, L. R. 1 Ex. 213. 125 Mass. 473; *Whitlock v. Workmen*, 15 Iowa, 351; *Lewis v. Alexander*, 51

<sup>2</sup> *Infra*, § 479; Wh. Cr. L. 8th ed. §§ 154-5, 168. Tex. 578.

<sup>3</sup> *Wald's Pollock*, 320, citing *Cannan v. Bryce*, 2 B. & Ald. 179; *Cutler v. Welsh*, 43 N. H. 497; *White v. Buss*, 3 Cush. 443; *Ruckman v. Bryan*, 3 Denio, 340; *Critcher v. Holloway*, 64 N. C. 526, and other cases.

<sup>4</sup> *Wald's Pollock*, 320, citing *Cannan v. Bryce*, 2 B. & Ald. 179; *Cutler v. Welsh*, 43 N. H. 497; *White v. Buss*, 3 Cush. 443; *Ruckman v. Bryan*, 3 Denio, 340; *Critcher v. Holloway*, 64 N. C. 526, and other cases.

been in some sense executed.<sup>1</sup> *Cogitationis poenam nemo patitur.*<sup>2</sup> There must be a union of purposes between the party supplying and the party supplied in order to infect the former with the latter's criminality. A money-lender may know that the person to whom he lends money intends to spend this money in gambling or in the purchase of illegal stimulants; but this will not prohibit his recovery in a suit on the loan. A capitalist may know that it is the intention of a foreign government with whom he is negotiating a loan to apply the money borrowed to belligerent purposes; but this knowledge, if war has not yet broken out, does not infect the lender with complicity. The lender of money on a mortgage on a store is not precluded from recovering it by the fact that he knows the mortgagor intends to open gambling tables, or to store prohibited drugs on the premises. It is not enough, therefore, in order to establish such complicity as defeats a right to recover in such cases, that the party supplying the goods or money knows that the party supplied intends to use them for an illegal purpose. There must be a combination between them to effect such purpose.<sup>3</sup> *A fortiori*, there may be a recovery when the vendor did not know of the illegal purpose.<sup>4</sup>—It is submitted with much deference that the later English cases are not so inconsistent with the earlier as is supposed by

<sup>1</sup> *Infra*, § 354-5.

<sup>2</sup> L. 18 D. de poenas, 48, 13, 2.

<sup>3</sup> Wh. Cr. L. §§ 225 *et seq.*; Holman v. Johnson, 1 Cowp. 341; Waymell v. Reed, 5 T. R. 599; Pellecat v. Angell, 2 C. M. & R. 311; Armstrong v. Toler, 11 Wheat. 279; Planters' Bk. v. Union Bk., 16 Wall. 483; McBlair v. Gibbes, 17 How. (U.S.) 236; Brooks v. Martin, 2 Wall. 90; Hill v. Spear, 50 N. H. 253; Aiken v. Blaisdell, 41 Vt. 658; Foster v. Thurston, 11 Cush. 322; McIntyre v. Parks, 3 Met. 207; Lestapies v. Ingraham, 5 Barr, 71; Thomas v. Brady, 10 Barr, 164; Powell v. Smith, 66 N. C. 401; Walker v. Jefferies, 45 Miss. 160; Brunswick v. Vallean, 50 Iowa, 120; Williams v. Carr, 80

N. C. 294; Wallace v. Lark, 12 S. C. 576; McGavock v. Puryear, 6 Cold. 34; Henderson v. Waggoner, 2 Lea, 133; Kottwitz v. Alexander, 34 Tex. 689; Lewis v. Alexander, 51 Tex. 578. That a loan is subject to the same rule, see *supra*, § 341; Oxford Iron Co. v. Spradley, 46 Ala. 99; Michael v. Bacon, 49 Mo. 343.

<sup>4</sup> Prescott v. Norris, 32 N. H. 101. Where a contract, not in itself immoral, is prohibited by statute, so far as concerns one of the parties only, the other party may recover back from the party so prohibited any money paid under such a contract. *Walan v. Kerby*, 99 Mass. 1; *Schermerhorn v. Talman*, 4 Kern. 93.

both Mr. Pollock and Mr. Benjamin.<sup>1</sup> “The merely selling goods,” said Sir J. Mansfield, in 1813, adhering to the earlier rule, “knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just use of payment, *but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction.*”<sup>2</sup>—So far as concerns the italicized condition, if “sharer” means “continuing partner,” this is no longer the law.<sup>3</sup> But in spite of the breadth of expression with which this point has been ruled in the later cases, it can hardly be supposed that it is intended to affix the stigma of illegality to all sales of articles where the vendor, at the time of sale, knew that the vendee intended to put the article purchased to an illegal use. In the first place, knowledge of this kind is always a matter of inference; and unless there be complicity in the illegal transaction, such knowledge, in sales of articles partially prohibited, does not usually impress the party to whom it may occur. If I am prohibited from selling a particular article, then the sale is illegal; but if I am not so prohibited, then the knowledge that a purchaser will violate the law with the article does not make me a party to his conduct unless I combine with him for the purpose. Of course, combination may be inferred when his intention to break the law is known to me, and I give the article to him for this purpose. But knowledge that such an illegal use of the article is probable does not make me a confederate. The illegality rests in such case not on the knowledge, but on the confederacy.<sup>4</sup> If mere knowledge, also, more or less imperfect, of probable future illegal use, invalidates a sale, neither powder, nor fire-arms, nor poison could be sold in bulk.<sup>5</sup> No doubt some part of the aggregate of a large sale will be illegally used; and this will vitiate the whole. And a borrower could repudiate all loans whenever he could show that his

<sup>1</sup> Sales, 3d Am. ed. § 507.

*v. Brooks*, L. R. 1 Ex. 213; *Taylor v.*

<sup>2</sup> *Hodgson v. Semple*, 5 Taunt. 181.

*Chester*, L. R. 4 Q. B. 309.

<sup>3</sup> *Langton v. Hughes*, 1 M. & S. 593;

<sup>4</sup> See *Hill v. Spear*, 50 N. H. 283;

*Cannan v. Bryce*, 3 B. & A. 179; *Pearce*

*Gaylord v. Soragen*, 32 Vt. 110.

<sup>5</sup> See *infra*, § 446.

creditor knew he would be likely to use part of the money in illegally buying liquor, or in other illicit indulgence.<sup>1</sup>

§ 344. It is not necessary, however, that complicity should be shown by proof of an express combination between the parties.<sup>2</sup> When two persons, in correspondence with each other, are apparently pursuing the same object, in part by the same means, one performing part of an act, the other completing it, for the attainment of the object, the inference of complicity may be drawn.<sup>3</sup> But the use of unlawful means to carry out an agreement does not necessarily stamp the agree-

Complicity and illegality to be inferentially shown and by preponderance of proof.

<sup>1</sup> See *McGavock v. Puryear*, 6 Cold. 34. In *Gaylord v. Soragen*, 32 Vt. 110, an action for selling liquor in bulk in New York, where the sale was legal, to be retailed in Vermont, where the sale would be illegal, Aldis, J., said: "Although mere knowledge of the unlawful intent of the vendee by the vendor will not bar him from enforcing his contract to recover for the goods in our courts, yet it is well settled that if he in any way aid the vendee in his unlawful design to violate our laws, such participation in the illegal enterprise will disqualify him from maintaining an action on his contract in this state. The participation by the vendor must be active, to some extent; he must do something, though indirectly, in furtherance of the vendee's design to violate our laws. Mere omission to act is not enough; but positive acts in aid of the unlawful purpose, however slight, are sufficient." See to same effect *Green v. Collins*, 3 Cliff. 494; *Aiken v. Blaisdell*, 41 Vt. 656; *Tuttle v. Holland*, 43 Vt. 542; *Hill v. Spear*, 50 N. H. 253.—In *Adams v. Couillard*, 102 Miss. 167, Colt, J., said: "Clearly it is not enough if he has only reasonable cause to believe that a violation of law is intended." In *Webster v. Munger*, 8 Gray, 587, Thomas, J., said: "The distinction is

sound between a case where a seller simply has knowledge of the illegal design—no more—and where he makes a sale with a view to such design, for the purpose of enabling the purchaser to effect it." In *Green v. Collins*, 3 Cliff. 494, Judge Clifford argues with great force that mere knowledge of future illegal use does not vitiate, unless it is an ingredient of the contract that the law should be violated, or the seller combines with the purchaser to violate the law; citing to this effect *Sortwell v. Hughes*, 1 Curt. 245. To the same point the learned American editor of Benjamin on Sales, § 511, note *a*, cites *Harris v. Runnels*, 12 How. U. S. 79; *Smith v. Godfrey*, 28 N. H. 379; *White v. Buss*, 3 Cush. 443; *Peck v. Briggs*, 3 Denio, 107; *Tracy v. Talmage*, 14 N. Y. 173; *Curtis v. Leavitt*, 15 N. Y. 15; *Cheney v. Duke*, 10 Gill & J. 11; *Rindskopf v. De Ruyter*, 39 Mich. 1; *Bishop v. Honey*, 34 Tex. 245.

<sup>2</sup> *R. v. Parsons*, 1 W. Bl. 392; *R. v. Whitehouse*, 6 Cox C. C. 38; *Aiken v. Blaisdell*, 41 Vt. 658; *Foster v. Thurston*, 11 Cush. 322; *Kelley v. People*, 55 N. Y. 566; *Bloomer v. State*, 48 Md. 521; and see Wh. on Ev. § 7.

<sup>3</sup> See Wh. Cr. L. 8th ed. §§ 1398 *et seq.*

ment with illegality.<sup>1</sup>—It is admissible to prove by extrinsic facts that a contract, however innocent in terms, is illegal either by statute or by common law.<sup>2</sup> It may be also shown that the consideration was immoral or illegal by statute.<sup>3</sup>—It is sufficient if illegality is established by a preponderance of proof. It is not necessary to establish it beyond reasonable doubt.<sup>4</sup> But the burden of proof is on a party seeking to set up the illegality of a transaction.<sup>5</sup>

§ 345. A distinction has been taken between “crimes involving great moral turpitude,” and other offences “not amounting to felony,” and it is argued that complicity in the latter does not preclude a party from suing on the transaction.<sup>6</sup> But a conspiracy to commit a misdemeanor is as indictable as is a conspiracy to commit a felony, and hence a civil suit to further the former kind of conspiracy cannot be tolerated any more than a civil suit to further the latter. The question, when a party seeks to sue on an illegal adventure, is not the grade of the offence, but the fact of illegality. The distinction between felony and misdemeanor is no test. It is abandoned in many jurisdictions, and will soon be abandoned in all jurisdictions;<sup>7</sup> and many misdemeanors are more heinous than some felonies. Nor is there any line of turpitude that can be drawn that can be relied on as a satisfactory basis of distinction. If, in a suit of this kind, it should appear that the plaintiff is suing for the purpose of putting in operation an illegal adventure, or of recovering the fruits of such adventure, then his suit cannot

<sup>1</sup> *Fraser v. Hill*, 1 Macq. 392.

<sup>2</sup> Wh. on Ev. §§ 927-931; Smith's L. C. 7th Am. ed. 700; *Roby v. West*, 4 N. H. 285; *Bayley v. Taber*, 5 Mass. 286; *Farrar v. Barton*, 5 Mass. 395; *Wheeler v. Russel*, 17 Mass. 258; *Dexter v. Snow*, 12 Cush. 594; *Bloss v. Bloomer*, 23 Barb. 604.

<sup>3</sup> *Ibid.*; *Cannan v. Bryce*, 3 B. & Ald. 179; *M'Kinnell v. Robinson*, 3 M. & W. 434; *Kennett v. Chambers*, 14 How. U. S. 38; *Perkins v. Savage*, 15 Wend. 412; *Staples v. Gould*, 5 Sandf.

411; *Badgley v. Beale*, 3 Watts, 263; see Smith's L. C. 7th Am. ed. 700.

<sup>4</sup> *Supra*, § 239; Wh. on Ev. § 1245, and cases there cited; *Ware v. Jones*, 61 Ala. 288; *Bixby v. Carskadden*, 55 Iowa, 533.

<sup>5</sup> *Beetem v. Burkholder*, 69 Penn. St. 249; Wh. on Ev. § 358.

<sup>6</sup> *Wald's Pollock*, 365, citing *Tracy v. Talmage*, 14 N. Y. 162; *Bickel v. Sheets*, 24 Ind. 1; *Michael v. Bacon*, 49 Mo. 474; *Steale v. Curle*, 4 Dana, 381; *Armfield v. Tate*, 7 Ired. L. 258; *Hubbard v. Moore*, 24 La. An. 591.

<sup>7</sup> *Infra*, § 484.

be maintained, no matter what may be the degree of the turpitude of the offence in which he is concerned.<sup>1</sup> The distinction, also, between statutory and common law offences in this respect is no longer maintained.<sup>2</sup> Whatever may have been once thought, "there is no valid distinction in the application of the law upon the subject between *mala prohibita* and *mala in se*; and if it were ever regarded, it has now been wholly laid aside in the decision of the later English cases."<sup>3</sup> The only distinctions to be recognized are the following: (1) Of contracts which are not prohibited by law or immoral, there are some which it is against the policy of the law to enforce, and yet the fruits of which a person can obtain from a party unjustly holding them. It may be against the policy of the law to specifically execute such contracts, yet it may not be against the policy of the law to treat them when executed as giving title. In such cases "the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is, that the public interest requires that relief should be given; and it is given to the public through the party."<sup>4</sup> And in those cases, relief will be granted not only by setting aside the agreement or other transaction, but also, in many cases, by ordering a repayment of any money paid under it."<sup>5</sup>—(2) Dupes and victims of an illegal transaction are not precluded from suing on it.<sup>6</sup> They have this privilege, not because the illegality of the transaction is not of a heinous type, but because they are not personally tainted with the heinousness. (3) Mere knowledge of a contingent illegal application of supplies given, does not defeat a suit for remuneration.<sup>7</sup>

<sup>1</sup> See *Finch v. Mansfield*, 97 Mass. 89; *Suit v. Woodhull*, 113 Mass. 391.

<sup>2</sup> *Cannan v. Bryce*, 3 B. & A. 179; and cases cited *Benj. on Sales*, 3d Am. ed. § 507 *et seq.*

<sup>3</sup> *Foster, J., Hill v. Spear*, 50 N. H. 253; and see *Bank U. S. v. Owens*, 2 Pet. 527; *Clark v. Ins. Co.*, 1 Story, 109; *Greenough v. Balch*, 7 Greenl. 462; *White v. Buss*, 3 Cush. 448.

<sup>4</sup> *St. John v. St. John*, 11 Ves. 535; *Smith v. Bromley*, Doug. 696; *Hatch v. Hatch*, 9 Ves. 292; *Morris v. MacCulloch*, 2 Eden, 190; *Reynell v. Sprye*, 1 DeG. M. & G. 660.

<sup>5</sup> *Story, Eq. Jur.* 12th ed. § 298; *Reynell v. Sprye*, 1 DeG. M. & G. 660.

<sup>6</sup> *Infra*, § 353.

<sup>7</sup> *Supra*, § 343; *infra*, § 346.

§ 346. Even, supposing that out of a sale of goods or loan of money, illegal acts spring, these acts are not imputable to the party furnishing the supplies unless designed by him at the time the supplies were furnished. His position is that of an accessory before the fact; and an accessory before the fact is not responsible for crimes collateral to and not involved in the act which he specifically counsels.<sup>1</sup> The unlawful act, in other words, in order to infect him with complicity, must be part of a scheme to which he designedly contributes. There must be "a unity of design and purpose, such that the agreement" of sale or loan, "is really part and parcel of one entire unlawful scheme."<sup>2</sup> Hence, a bill for an account of partnership profits cannot be barred by the fact that in some particular transaction in which these profits were augmented, there was collateral illegal conduct.<sup>3</sup> Nor is an actor, who, unaware that a theatrical exhibition is unlicensed, contracts to perform with the managers of the exhibition, barred from recovery on the contract.<sup>4</sup>

§ 347. The taint of illegality, as far as concerns a contract, only affects the parties to the contract, not reaching, unless proceedings by way of confiscation are directed, to the thing which is the object of the contract.<sup>5</sup> Hence, a party who has smuggled goods can recover the price of them on a contract of sale with a third party who was not implicated in the smuggling.<sup>6</sup> A purchaser, also, as a general rule, of personal property fraudulently obtained, is not, if he buys without notice, and for a

<sup>1</sup> Wh. Cr. L. 8th ed. §§ 212, 229; As to what is collateral, see *Fisher v. Waugh v. Morris*, L. R. 8 Q. B. 202; *Bridges*, 2 E. & B. 118; 3 E. & B. Sewell v. Ins. Co., 4 Taunt. 556; 642. *People v. Knapp*, 26 Mich. 112; *Sawyer v. Taggart*, 14 Bush, 727.

<sup>2</sup> Pollock, Wald's ed. 322, citing *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbes*, 17 How. 232; *Miltenberger v. Cooke*, 18 Wal. 421. To same effect, see *Emery v. Kempton*, 2 Gray, 257. <sup>3</sup> *Sharp v. Taylor*, 2 Phill. 801. <sup>4</sup> *Roy v. Johnson*, 7 Gray, 162; see *supra*, § 343. <sup>5</sup> See *Tenant v. Elliott*, 1 Bro. & P. 3; *Fisher v. Bridges*, 3 E. & B. 642. <sup>6</sup> *Armstrong v. Toler*, 11 Wheat. 258, 271.



valuable consideration, infected by the fraud.<sup>1</sup> And a note given for intoxicating liquors is good, under the Maine statute, in the hands of a *bona fide* endorsee for value.<sup>2</sup> On the other hand, an assignee or endorsee is subject to all equities of which he has notice.<sup>3</sup>

§ 348. We will elsewhere see that a landlord cannot recover the rent of a house leased by him to be used as a house of ill-fame.<sup>4</sup> On the same reasoning, rent cannot be recovered when the object was to establish what the lessor at the time of the lease knew would be an illegal nuisance, in whose profits he was to share;<sup>5</sup> as where the house was to be used to sell intoxicating liquors in violation of license laws.<sup>6</sup> Nor when a building is let in violation of a statute can the lessor recover on any covenant in the lease.<sup>7</sup> But it is not enough, to vitiate such a lease, that the landlord should regard it as probable that illegal acts would be done in the premises demised, for if so, few leases could escape impeachment. The lease, to be thus void, must have been made for the express illegal purpose, and with the intention of sharing the illegal profits.<sup>8</sup> Nor is a lease avoided by the lessee, subsequently to the execution of the lease, using the premises for an illegal purpose, even though he may have intended this at the time of the lease.<sup>9</sup>

Landlord cannot recover rent of house to be illegally used.

§ 349. In accordance with the distinctions maintained in respect to agency,<sup>10</sup> the courts will not enforce a contract of partnership for conducting an illegal enterprise, or compel an account of profits

Partnership in illegal enterprise will not be enforced.

<sup>1</sup> *Supra*, §§ 211, 291; *infra*, § 733. As to market overt, see *infra*, § 734; Story, Eq. Jur. 12th ed. §§ 421-434, 436.

<sup>2</sup> Cottle v. Cleaves, 70 Me. 256; and so as to duress, *supra*, § 146.

<sup>3</sup> Story, Eq. Jur. 12th ed. §§ 395-8; Murray v. Ballou, 1 John. Ch. 566; Heatley v. Finster, 2 John. Ch. 158. As to notice, see Story, *ut supra*, §§ 401 *et seq.*

<sup>4</sup> See *infra*, § 374.

<sup>5</sup> Flight v. Clarke, 13 M. & W. 155; Cowan v. Melbourn, L. R. 2 Ex. 230; Riley v. Jordan, 122 Mass. 231; Ralston v. Boady, 20 Ga. 449. As to distinctions see *supra*, § 343.

<sup>6</sup> Ritchie v. Smith, 6 C. B. 462.

<sup>7</sup> Gas Light Co. v. Turner, 5 Bing. N. C. 666; 6 ib. 324.

<sup>8</sup> *Supra*, § 343.

<sup>9</sup> Feret v. Hill, 15 C. B. 207; see Cowan v. Milbourn, L. R. 2 Ex. 230.

<sup>10</sup> See *infra*, § 357.

of such transactions.<sup>1</sup> Such a partnership will be a nullity, so far as concerns all executory action.<sup>2</sup> The same rule applies when the structure of a partnership is technically illegal. Hence, under a statute requiring the names of all pawnbrokers to be printed over the doors of their shops, it was ruled that an agreement for a pawnbroker partnership with dormant partners is illegal;<sup>3</sup> and the same rule applies to a partnership as attorneys, by parties made by statute to be incompetent to act as such.<sup>4</sup>—A partner in an illegal transaction cannot enforce any executory action on the other partners.<sup>5</sup> But when the partnership affairs are closed, one partner cannot excuse himself from accounting to the other on the ground that one of the objects of the partnership was illegal.<sup>6</sup>

§ 350. An insurance of an illegal voyage is void; and the insured cannot recover in case of loss;<sup>7</sup> nor can the underwriter recover the premium, which, if the voyage was illegal, was without consideration.<sup>8</sup> But the illegality is not imputable to either ship-owner or insurer if caused by the act of the master alone, without their cognizance or connivance.<sup>9</sup>—An insurance of

Insurances on illegal voyages are void, and so of illegal sales.

<sup>1</sup> Knowles *v.* Haughton, 11 Ves. 168; Ewing *c.* Osbaldistone, 2 M. & Cr. 53; Sykes *c.* Beadon, L. R. 11 Ch. D. 170; but see Brooks *c.* Martin, 2 Wall. 70, and criticism in Wald's Pollock, 329; Dunham *c.* Presby, 120 Mass. 285; Anderson *c.* Powell, 44 Iowa, 20; McWilliams *v.* Bryan, 21 La. An. 211; Seely *c.* Beck, 42 Mo. 143.

<sup>2</sup> Story on Part. 7th ed. § 6; citing Gordon *c.* Howden, 12 Cl. & F. 237; Watson *c.* Fletcher, 7 Grat. 1 (a case of a gaming partnership); McPherson *v.* Pemberton, 1 Jones, N. C. 378.

<sup>3</sup> Armstrong *v.* Armstrong, 3 Myl. & K. 45; Armstrong *v.* Lewis, 2 Cr. & M. 274.

<sup>4</sup> Williams *v.* Jones, 5 B. & C. 108; Joyce *ex parte*, L. R. 4 Ch. D. 596.

<sup>5</sup> Story on Part. 7th ed. § 6; De Begnis *v.* Armistead, 10 Bing. 107; Stewart *c.* Gibson, 7 Cl. & F. 107; Watson *v.* Murray, 8 C. E. Green, 257.

<sup>6</sup> See *infra*, § 357; Watts *c.* Brooks, 3 Ves. 612; Sharp *c.* Taylor, 2 Phill. 801; Harvey *v.* Varney, 98 Mass. 118; Sampson *v.* Shaw, 101 Mass. 148; Snell *c.* Dwight, 120 Mass. 9; King *c.* Winants, 71 N. C. 469; Belcher *c.* Conner, 1 S. C. 88; Pfeiffer *c.* Maltby, 38 Tex. 523. That illegal may be severed from legal items in an account, see Anderson *v.* Powell, 44 Iowa, 20; *supra*, § 338.

<sup>7</sup> Brandon *c.* Nesbitt, 6 T. R. 23; Furtado *v.* Rodgers, 3 B. & P. 191.

<sup>8</sup> Jenkins *v.* Power, 6 M. & S. 282.

<sup>9</sup> Dudgeon *c.* Pembroke, L. R. 9 Q. B. 511; see *infra*, § 353.

liquors meant for illegal sale is invalid when the insurance is part of an arrangement to further the illegality.<sup>1</sup>

§ 351. All subsequent securities, given for a prior illegal indebtedness, are, as between the parties, infected with the illegality of the original transaction.<sup>2</sup> This is the case with bonds,<sup>3</sup> and with judgments as between the parties.<sup>4</sup> Negotiable paper, however, so far as concerns *bona fide* holders without notice, is relieved from the taint of illegality, which operates between the immediate parties.<sup>5</sup>

Subsequent securities infected with illegality.

§ 352. Supposing that a contract is executed, it cannot be overhauled by either of the parties on proof of illegality of consideration; nor can a transfer of property when once made be invalidated on the ground of illegality of the consideration.<sup>6</sup> It is otherwise, however, when a party defrauded seeks restoration and restitution on ground of fraud.<sup>7</sup>—Between an unexecuted and an executed illegal agreement there is this wide difference, that property passed under the former is held as by a mere stakeholder, without consideration received, while property passed under the latter is transferred absolutely, on a consideration which, however illegal, was deemed by the parties adequate. And the rule is that when property so passes it cannot be recovered back.<sup>8</sup> This has been held to be the case with regard to money paid to trustees for a woman on account of past illicit cohabita-

Executed contract cannot be overhauled on account of illegality; nor can either party recover back.

<sup>1</sup> Carrigan v. Ins. Co., 53 Vt. 418.

<sup>2</sup> Chapman v. Black, 2 B. & Ald. 588; Wynne v. Callander, 1 Russ. 293; Graeme v. Wroughton, 11 Ex. 146; Geere v. Mare, 2 H. & C. 339; Dewitt v. Brisbane, 16 N. Y. 508.

<sup>3</sup> Fisher v. Bridges, 3 E. & B. 642 (reversing S. C., 2 E. & B. 118); Geere v. Mare, 2 H. & C. 339; Amory v. Meryweather, 2 B. & C. 573.

<sup>4</sup> Hutchinson v. Ledlie, 36 Penn. St. 112.

<sup>5</sup> *Supra*, § 347.

<sup>6</sup> *Infra*, §§ 377, 384; Pollock, 269,

320; Story, Eq. Jur. § 296; Ayerst v. Jenkins, L. R. 16 Eq. 275; Howson v. Hancock, 8 T. R. 575; Waun v. Kelly, 2 McCrary, 628; Phelps v. Decker, 10 Mass. 267; Worcester v. Eaton, 11 Mass. 368; Fox v. Cash, 11 Penn. St. 207; Gisaf v. Neval, 81 Penn. St. 354; Pfeuffer v. Maltby, 54 Tex. 454.

<sup>7</sup> *Supra*, §§ 282, 340; *infra*, § 353.

<sup>8</sup> *Infra*, § 733; Howson v. Hancock, 8 T. R. 575; Vandyke v. Hewett, 1 East, 97; Taylor v. Chester, L. R. 4 Q. B. 314; Scarfe v. Morgan, 4 M. & W. 281.

tion;<sup>1</sup> to contracts with a public enemy;<sup>2</sup> to premiums on illegal insurance after the risk is determined;<sup>3</sup> and to money paid on an illegal insurance on account of loss.<sup>4</sup>—Whether a title can vest under an illegal contract has been disputed. It has been held by the Supreme Court of the United States that a party who obtains possession of goods by a contract with a public enemy, which is void by the *lex fori*, cannot, if such goods are taken from him without right by a third party, recover them from such third party.<sup>5</sup> But the better view is that, when a party acquires property through an illegal contract, he can recover such property from a third person who has taken it from him without right.<sup>6</sup> It is true that, as against the rightful owner, a party without title cannot pass title.<sup>7</sup> But title resting on possession may be asserted against a third party who is a mere wrongdoer.<sup>8</sup> It has also been held that partners to a contraband contract may obtain the assistance of the courts in adjusting their accounts in which such a contract forms an item.<sup>9</sup>

§ 353. To the rule that parties implicated in an executed illegal transaction have no remedy against each other, an exception is recognized in cases where one is the victim of duress, or fraud, or superior influence.<sup>10</sup> A party, for instance, who buys spirituous liquors

<sup>1</sup> *Ayerst v. Jenkins*, L. R. 16 Eq. 275; *infra*, § 373.

<sup>2</sup> *Infra*, § 473.

<sup>3</sup> *Andre v. Fletcher*, 3 T. R. 266; *Allkins v. Tupe*, L. R. 2 C. P. D. 375.

<sup>4</sup> *Tenant v. Elliott*, 1 B. & P. 4.

<sup>5</sup> *Montgomery v. U. S.*, 15 Wal. 395; *Whitfield v. U. S.*, 92 U. S. 165; *Desmore v. U. S.*, 73 U. S. 605.

<sup>6</sup> *Tenant v. Elliott*, 1 B. & P. 3; *Merritt v. Millard*, 4 Keyes, 208; *Robinson v. Ins. Co.*, 42 N. Y. 54; *Clements v. Yturria*, 81 N. Y. 285; *Pfeuffer v. Maltby*, 54 Tex. 454.

<sup>7</sup> *Supra*, § 292.

<sup>8</sup> See Wh. Cr. L. 8th ed. § 945. In *White v. Franklin Bank*, 22 Pick. 186, Wilde, J., said: "Where money

is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund." "Where the parties are not *in pari delicto*, the rule *potior est conditio defendentis* is not applicable." See *Lovell v. R. R.*, 23 Pick. 32; *Sampson v. Shaw*, 101 Mass. 150; *Tracy v. Talmage*, 4 Kernan, 162; *Schermerhorn v. Talman*, 4 Kernan, 93. As to distinctions of turpitude, see *supra*, § 345.

<sup>9</sup> *De Leon v. Trevino*, 49 Tex. 88; *infra*, § 357.

<sup>10</sup> *Smith v. Bromley*, Doug. 696; *Browning v. Morris*, 2 Cowp. 790; *Prescott v. Norris*, 32 N. H. 101; *Lowell v. R. R.*, 23 Pick. 32; *Walan v. Kerby*, 99 Mass. 1; *Sampson v. Shaw*, 101

illegally sold is not, if he were at the time imposed on, necessarily so implicated in the illegality that he may not sue for money paid on the sale, or for false warranty.<sup>1</sup> A debtor, also, who, when in great difficulty, in order to get the consent of an unscrupulous creditor to a settlement, secretly pays such creditor a bonus in fraud of other creditors, can recover back the money so paid;<sup>2</sup> and the same rule applies where a defendant pays money to get rid of a criminal prosecution or a penal suit,<sup>3</sup> to usurious contracts which the borrower has been compelled by the creditor's harshness to accept;<sup>4</sup> and to cases where bankrupts pay money to buy off an opposing creditor.<sup>5</sup>

Mass. 150; Phalen *v.* Clark, 19 Conn. 421; Schermerhorn *v.* Talman, 4 Kern. 93; Deming *v.* State, 23 Ind. 416; Davidson *v.* Carter, 55 Iowa, 117; Heckman *v.* Swartz, 50 Wis. 267; Poston *v.* Balch, 69 Mo. 115.

<sup>1</sup> Prescott *v.* Norris, 32 N. H. 101; Walan *v.* Kerby, 99 Mass. 1. See *infra*, § 354.

<sup>2</sup> Atkinson *v.* Derby, 7 H. & N. 934; Leuzberg's Policy *in re*, L. R. 7 C. D. 650; Bean *v.* Amsink, 10 Blatch. 361; Crossley *v.* Moore, 40 N. J. L. 27; and cases cited Wald's Pollock, 331; *infra*, § 737.

<sup>3</sup> Unwin *v.* Leaper, 1 M. & G. 747; *infra*, § 737.

<sup>4</sup> Vandyck *v.* Hewitt, 1 East, 98; Astley *v.* Reynolds, 2 Str. 916; Brown- ing *v.* Morris, 2 Cowp. 792; *infra*, § 469.

<sup>5</sup> Smith *v.* Bromley, Doug. 696 n; Sievers *v.* Boswell, 3 Man. & Gr. 524. On the whole question see 1 Story Eq. Jur. 12th ed. § 321. As to gambling debts, see *infra*, § 454.

As conflicting with the text may be noticed Hackett *v.* Chellerton, 13 R. I., where it was ruled that an action does not lie by an infant on a contract of service forbidden by statute. The distinction is thus stated by Durfee, C. J. . "The law, however, while it will give no remedy on the illegal contract, does

not always utterly refuse relief. It is settled that where a party has paid money or delivered personal property on a contract which is illegal because it involves the violation of a statute, he can recover it back in an action commenced while the contract remains simply executory, the recovery being had not under the contract, which is void, but in disaffirmance of it, on a promise implied or right existing independently of it. Congress & Empire Spring Co. *v.* Knowlton, 103 U. S. 49; Chitty on Cont. 11th Am. ed. 944. The case at bar does not fall under this rule, for in the case at bar the plaintiff has himself executed the contract. There are cases which go further and hold that money so paid or property so delivered can be recovered back, even after the contract has been fully executed, if the plaintiff is an innocent party or is not *in pari delicto* with the defendant. Tracy *v.* Talmage, 14 N. Y. 162. In this case also the recovery is had not under, but independently of the contract, the contract being treated as a nullity. Can the plaintiff recover on the authority of these latter cases, recovering of course on a *quantum meruit* the value of his services? Can he be regarded as an innocent or comparatively innocent and unoffending party? We think not. The cases which sup-

In equity this protection has been extended so as to cover all cases of imposition. "Where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the most excusable of the two, to sue for relief against the transaction, relief is given to him."<sup>1</sup> "One party," says Judge Story, taking the same distinction, "may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offence. And besides, there may be, on the part of the court itself, a necessity for supporting the public interests or public policy, in many cases, however reprehensible the acts of the parties may be."<sup>2</sup>

port the doctrine last stated are cases where the statutory prohibition is directed solely against the defendant. That is not this case. Here the prohibition is directed, not against particular persons, but against a particular thing, namely, the employment of minors in manufacturing establishments. The language of the statute is 'no minor, etc., shall be employed,' which means not only that no manufacturer shall employ any minor, but also—what it says—that no minor shall be employed, the employment itself being interdicted. The plaintiff is therefore suing for compensation for having violated the statute, for having done a forbidden thing, which is very different from suing for money or property paid or delivered on a contract, the execution of which does not involve the plaintiff in the violation of any statute, but only the defendant. *Thomas v. City of Richmond*, 12 Wall. 349, 356." See as sustaining the text *White v. Bank*, 22 Pick. 181; see also *Tracy v. Talmage*, 14 N. Y. 162; *Ford v. Harrington*, 16 N. Y. 285; *Long v. Long*, 9 Md. 348; and cases cited *Smith's L. C.* 7th Am. ed. 699.

<sup>1</sup> Knight Bruce, L. J., opinion in *Reynell v. Sprye*, 1 D. M. G. 660; *Osborne v. Williams*, 18 Ves. 379. See *Ford v. Harrington*, 16 N. Y. 285, and cases cited *Wald's Pollock*, 333; *Browning v. Morris*, 2 Cowp. 792; *Hatch v. Hatch*, 9 Ves. 298; *Lowell v. R. R.*, 23 Pick. 22; *Pinckston v. Brown*, 3 Jones's Eq. 494.

<sup>2</sup> Story's Eq. Jur. 12th ed. § 300, citing *Woodhouse v. Meredith*, 1 Jac. & W. 224; *Morris v. MacCulloch*, 2 Eden, 190.

In *Smart v. White*, 73 Me. (26 Alb. L. J. 12), we have the following from *Peters, J.*: "The principle that where the offence is merely *malum prohibitum* and not in itself immoral, a person may recover back money paid under an illegal contract to the party who is wholly or principally the wrong-doer, runs through a long line of decisions which bear more or less analogy to the present case. The case at bar is a stronger case for the application of the principle than most of them. In *Smith's Cont.* 204, it is said there is an exception to the rule or maxim, *in pari delicto, potior est conditio defendentis*, 'where the illegality is created by some statute,

§ 354. Where money has been paid on an illegal consideration, it may be recovered back at any time while the con-

the object of which is to protect one class of men against another, or where the illegal contract has been extorted from one party by the oppression of the other.' And it is there further said: 'In cases of this sort, although the contract is illegal, and although a person belonging to the class against whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the act more efficacious.' The English cases quoted by the author to illustrate the principle are many and various. In *Smith v. Cuff*, 6 M. & Selw. 160, Lord Ellenborough says: 'This is not a case of *par delictum*, but of oppression on one side and submission on the other; it can never be predicated as *par delictum* when one holds the rod and the other bows to it; there was an inequality of situation between the parties.'

"In *Curtiss v. Leavitt*, 15 N. Y. 9, it was held that 'where a contract otherwise unobjectionable is prohibited by a statute which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and upon disaffirming the contract may recover as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract.' Other New York cases are to the same effect. *Schermerhorn v. Talman*, 4 Kern. 93, and *Tracy v. Talmage*, id. 162, are to the same point, and contain copious citations of analogous cases. Benj. on Sales, 3d Am. ed. § 509, note c, and cases cited.

"In *White v. Franklin Bank*, 22 Pick. 181, where a plaintiff had deposited money in a bank repayable at a

future day, in violation of a statute of Massachusetts, he was allowed to recover back the deposit upon the ground that although both parties were culpable the defendants were the principal offenders. The court there said that to deny the action would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to take an advantage of the unwary and those who had no knowledge of the law or the illegality of such transaction. In *Lowell v. Boston and Lowell R. Co.*, 23 Pick. 24, the same doctrine is restated and reaffirmed as applicable to another class of facts. In *Atlas Bank v. Nahant Bank*, 3 Metc. 581, 585, the same court, speaking of the decision in *White v. Franklin Bank*, says: 'To have decided otherwise would have given effect to an illegal contract in favor of the principal offender, and would have operated as a reward for an offence which the statute was intended to prevent.' In *Walan v. Kerby*, 99 Mass. 1, in construing an act relating to the sale of intoxicating liquors, the court say: 'The seller and buyer of intoxicating liquors sold in violation of law are not *in pari delicto*, because the latter is guilty of no offence. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction of which he offers evidence is wholly on the part of the defendant, and he himself is not *particeps criminis*.'

"Other illustrations of the principle are found in many other cases. The doctrine is commented upon in *Concord v. Delaney*, 58 Me. 316; is considered in Connecticut in the case of *Cameron v. Peck*, 37 Conn. 555; and elaborately discussed in New Hampshire in the cases of *Prescott v. Norris*, 32 N. H.

tract is still unexecuted, by repudiating the agreement, supposing that the plaintiff is not using the process of the court as a criminal venture.<sup>1</sup> This has been held to be the case with money paid as consideration of void wagering contracts,<sup>2</sup> and with money deposited with a stakeholder to be paid over according to the event of an illegal or void wager.<sup>3</sup> In all cases of this class, however, the plaintiff must act promptly and fairly, and give previous notice that he repudiated the agreement.<sup>4</sup> The reason is that in such cases the plaintiff's claim is not to enforce, but to repudiate, an illegal contract. The object of the suit is not to get paid for something illegally done, but to prevent the defendant from using an illegal pretext to retain money unlawfully detained. In conformity with this view it was held by the Supreme Court of the United States, in 1881, that where a New York corporation increased its capital stock in contravention of the statutes of that state, a subscriber who paid an assessment on the shares allotted to him could recover back from the corporation the amount so paid.<sup>5</sup> One party,

Money paid on executory illegal agreement may be recovered back.

101, and *Butler v. Northumberland*, id. 33, 39." See *infra*, § 730, as to principle ruled in this case.

<sup>1</sup> Leake, 2d ed. 772 *et seq.*; 2 Addis. Con. § 1412; *Hasfelow v. Jackson*, 8 B. & C. 221; *Bone v. Eckless*, 5 H. & N. 925; *Palyart v. Leckie*, 6 M. & S. 290; *Aubert v. Walsh*, 3 Taunt. 277; *Tappenden v. Randall*, 2 B. & P. 467; *Busk v. Walsh*, 4 Taunt. 290; *Smith v. Bickmore*, 4 Taunt. 474; *Gatty v. Field*, 9 Q. B. 431; *Taylor v. Bowers*, L. R. 1 Q. B. D. 291; *Thomas v. Richmond*, 12 Wall. 355; *White v. Bank*, 22 Pick. 184; *Lowell v. R. R.*, 23 Pick. 24; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Adams Ex. Co. v. Reno*, 48 Mo. 264. See, however, *Kingsbury v. Flemming*, 66 N. C. 524; *Alston v. Durant*, 2 Strobb. 257. In *Kiewert v. Rindskopf*, 46 Wis. 481, it was held that money extortionately received by attorney to obtain mitigation of sentence of a person under indictment could be recovered back.

<sup>2</sup> *Tappenden v. Randall*, 2 B. & P. 467; *Busk v. Walsh*, 4 Taunt. 290; *Colton v. Thurland*, 5 T. R. 405; *infra*, §§ 449 *et seq.*

<sup>3</sup> *Ibid.*; *Hodson v. Terrill*, 1 C. & M. 797; *Batson v. Newman*, L. R. 1 C. P. D. 573; *Hampden v. Walsh*, L. R. 1 Q. B. D. 189; see *infra*, §§ 726, 729.

<sup>4</sup> *Palyart v. Leckie*, 6 M. & S. 290; *Foote v. Emerson*, 10 Vt. 338; *Dixon v. Ormstead*, 9 Vt. 310; see *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652.

<sup>5</sup> *Spring Co. v. Knowlton*, 103 U. S. 49.

In the opinion of the court, Woods, J., said: "The views of the text-writers are sustained by a vast array of authorities, both English and American. A few will be cited. The case of *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291, was an action to recover the value of property assigned for the purpose of defrauding creditors. A verdict was



also, cannot hold back proceeds from another of whom he was representative, on the ground that there was illegality in the way of getting the money.<sup>1</sup> But where the plaintiff and the defendant agreed to conduct an unlicensed theatre, the enterprise being illegal, and the plaintiff in pursuance of the agreement paid out certain money, with the expectation of large gains if the enterprise was forced through, it was held that

rendered for plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the chief justice, Cockburn, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

"Lord Justice Mellish, in the Court of Appeals, said: 'If the illegal transaction had been carried out, the plaintiff could not, in my judgment, have recovered the money. But the illegal transaction was not carried out, it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined on and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done.'

"In *Thomas v. The City of Richmond*, 12 Wall. 355, this court cites with approval the note of Mr. Frere to the case of *Smith v. Bromley*, 2 Doug. 696, to the effect that a recovery can be had as for money had and received, when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentie*; the *delictum* is incomplete, the contract may be rescinded by either party.

"The rule is applied in the great majority of the cases, even when the parties to the illegal contract are in *pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan."

*Aff. Knowlton v. C. & E. Springs*, 14 Blatch. 364; see, *contra*, *S. C.*, 57 N. Y. 518; *cf. White v. Bank*, 22 Pick. 181; *Lowell v. R. R.*, 23 Pick. 32; *Utica Ins. Co. v. Scott*, 19 John. 1; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Curtis v. Leavitt*, 15 N. Y. 9; *Skinner v. Henderson*, 10 Mo. 205.

<sup>1</sup> *Infra*, § 357; *Armstrong v. Toler*, 11 Wheat. 258; *Planters' Bk. v. Union Bk.*, 16 Wall. 483; *Baehr v. Wolf*, 59 Ill. 470; *Douville v. Meenik*, 25 Wis. 688; *Heckman v. Swartz*, 50 Wis. 264; and other cases cited, *infra*, § 357.

he could not call upon the defendant to contribute.<sup>1</sup> And, as a general rule, a party who goes into an illegal enterprise risks all he puts in it, and cannot, in case of his confederate proving untrue, or the adventure miscarrying, recover back his advances.<sup>2</sup> It should be added that if there be an agreement to rescind an illegal contract, and to return the money advanced on one side, the contract not having become operative, a suit lies to recover such money back.<sup>3</sup>

§ 355. Goods deposited with a party for illegal purposes, the deposit not amounting to a substantive offence, may be reclaimed and recovered back by the owner upon repudiating the bailment.<sup>4</sup> This has been held to be the case where goods are transferred under a fictitious sale to an agent for the purpose of eluding the owner's creditors, in which case the owner, by repudiating the transaction, may recover them from the agent, or his assignee with notice.<sup>5</sup> "The vendor who had sold goods so as to pass the general property, but without delivery, or the lessor who had executed a demise to take effect at a future day, might rescind the contract and stand remitted to his original possession on learning the unlawful use of the property designed by the purchaser or lessee." And even supposing the illegal purpose was known, yet if there was to be no complicity in carrying it out,<sup>7</sup> or if the agreement was rescinded before any action was taken on it, then there may be a recovery back.

<sup>1</sup> *De Begnis v. Armistead*, 10 Bing. 107.

<sup>2</sup> *Aubert v. Maze*, 2 B. & P. 371; *Booth v. Hodgson*, 6 T. R. 405; *Cannan v. Bryce*, 3 B. & Ald. 181; *supra*, §§ 335 *et seq.* See, *contra*, the earlier cases of *Burnell v. Minst*, 4 Moore, 340; *Faikney v. Reynous*, 4 Burr. 2069; *Petrie v. Hannay*, 3 T. R. 418.

<sup>3</sup> *Lea v. Cassen*, 61 Ala. 312; *infra*, § 355.

<sup>4</sup> See *infra*, § 725.

<sup>5</sup> *Leake*, 2d ed. 774; *Taylor v.*

*Bowers*, L. R. 1 Q. B. D. 291; *Symes v. Hughes*, L. R. 9 Eq. 475. In *Taylor v. Bowers*, A. transferred goods to B. under a fictitious assignment to defraud A.'s creditors. B. sold the goods to C., with notice of the fraud, but without A.'s consent. It was held that A. might repudiate the transaction and recover the goods from C.

<sup>6</sup> *Pollock*, 3d ed. 341.

<sup>7</sup> See *supra*, § 343.

§ 356. When, however, the mere fact of supplying either money or goods to an unlawful enterprise is criminal—*e. g.*, when money is contributed to a treasonable conspiracy—and when the fact of the supply goes to encourage others in forming an unlawful confederacy, then the agreement has been so far executed that the party supplying the goods or money cannot, by repudiating the contract, recover either back. He cannot play fast and loose. He cannot take his chance in a criminal venture, and then, after it is advanced in part by his aid, back out and recover what he contributes. The cases where this right of repudiation exists are those of merely unexecuted agreements in which the contribution was not a substantive crime.<sup>1</sup>

But when the mere supply was a crime, guilty party cannot recover back.

§ 357. If the contract between the principal and the agent was not of itself illegal, the agent cannot retain, as against his principal, the proceeds of a transaction conducted by him for his principal on the ground that the transaction was illegal.<sup>2</sup> And if A. pays money to B. for the use of C., B. cannot sustain a refusal to pay to C. by setting up the illegality of the agreement between A. and C.<sup>3</sup> A trustee, also, cannot refuse to account on ground that a particular in the trust involved a breach of the law.<sup>4</sup> Where, also, A., with B.'s consent, effects a policy for his own benefit in B.'s name for B.'s life, A. having no insurable interest therein, B. or his

Agent cannot hold back from principal on ground that the transaction was illegal.

<sup>1</sup> *Tappenden v. Randall*, 2 B. & P. 467. On the distinction between attempts which are merely inchoate conceptions, and are therefore not criminal, and attempts which are substantive crimes, see Wh. Cr. L. 8th ed. § § 180 *et seq.*

<sup>2</sup> *Infra*, § 725; Wh. on Agency, § § 242, 250, 573, 761; *Farmer v. Russell*, 1 B. & P. 296; *Tenant v. Elliott*, 1 B. & P. 3; *Bousfield v. Wilson*, 16 M. & W. 185; *Johnson v. Lansley*, 12 C. B. 468; *Planters' Bk. v. Union Bk.*, 16 Wal. 483; *Caldwell v. Harding*, 1 Lowell, 326; *Phalen v. Clark*, 19 Conn.

421; *Aubery v. Fisk*, 36 N. Y. 47; *Woodworth v. Bennett*, 43 N. Y. 273; *Murray v. Vanderbilt*, 39 Barb. 140; *Lestapies v. Ingraham*, 5 Barr, 71; *Baehr v. Wolf*, 59 Ill. 470; *Daniels v. Barney*, 22 Ind. 207; *Douville v. Merrick*, 25 Wis. 688; *Heckman v. Swartz*, 50 Wis. 267; *De Leon v. Trevino*, 49 Tex. 88; see *West. Un. Tel. Co. v. Blanchard*, 66 Ga.

<sup>3</sup> *Tenant v. Elliott*, 1 B. & P. 3; *Kinsman v. Parkhurst*, 18 How. 289.

<sup>4</sup> *Infra*, § 726; *Sheppard v. Oxenford*, 1 K. & J. 491; *Beeston v. Beeston*, L. R. 1 Ex. D. 13.

representatives cannot set up this fact against A.<sup>1</sup> An agent, also, on a settlement of accounts, cannot set up against a principal an illegal taint attaching to a special item.<sup>2</sup> Even though the purpose for which money is given to an agent may be illegal, the principal may revoke the advance at any time before actual appropriation takes place, or may recover the money from the agent in case the money be paid over by the latter after notice not to pay over.<sup>3</sup> But where the principal's title is based on tort, an agent may set up as against the principal the title of a third person from whom the goods were unlawfully taken, and who has given notice of suit for the goods.<sup>4</sup> And when the contract of agency is itself tainted with illegality, its enforcement will be refused;<sup>5</sup> and this is eminently the case when the act constituting the agency is in itself an indictable offence.<sup>6</sup> Nor can such a suit be maintained when the object is to obtain a share in an illegal speculation.<sup>7</sup>

## II. VIOLATION OF STATUTE.

§ 360. A contract whose object is to violate a statute will not be enforced by the courts of the state by which the statute is enacted.<sup>8</sup> Whether a contract conflicts with a statute is

<sup>1</sup> *Worthlington v. Curtis*, L. R. 1 Ch. D. 419.

<sup>2</sup> *Infra*, § 725.

<sup>3</sup> *Hastelow v. Jackson*, 8 B. & C. 221; *Bone v. Ekless*, 5 H. & N. 925; *Sampson v. Shaw*, 101 Mass. 145; *Bailey v. O'Mahony*, 33 N. Y. Sup. Ct. 239; and cases cited *supra*, §§ 354 *et seq.*; *infra*, § 725.

<sup>4</sup> 2 Story's Eq. Jur. § 317; *Taylor v. Plumer*, 3 M. & S. 562.

<sup>5</sup> *Hastelow v. Jackson*, 8 B. & C. 222; *Browning v. Morris*, 2 Cowp. 792.

<sup>6</sup> *Supra*, § 356.

<sup>7</sup> *Infra*, § 725.

<sup>8</sup> *Hope v. Hope*, 8 D. M. & G. 731; *Cork, etc. R. R. in re*, L. R. 4 Ch. Ap. 748; *Yorkshire Wagon Co. v. Maclure*, L. R. 19 Ch. D. 478; *Grell v. Levy*, 16 C.

B. N. S. 79; *Graeme v. Wroughton*, 11 Exch. 146; *Neuman v. Neuman*, 4 M. & S. 66; *Pellecat v. Angell*, 2 C. M. & R. 311; *Cope v. Rowlands*, 2 M. & W. 149; *Bank U. S. v. Owens*, 2 Pet. 527; *Thomas v. Richmond*, 12 Wall. 349; *Durgin v. Dyer*, 68 Me. 142; *Springfield Bank v. Merrick*, 14 Mass. 322; *Wheeler v. Russell*, 17 Mass. 258; *Miller v. Post*, 1 Allen, 434; *Smith v. Arnold*, 106 Mass. 269; *Prescott v. Battersby*, 119 Mass. 285; *Hackett v. Chellerton*, 13 R. I.; *Barton v. Plank Road*, 17 Barb. 397; *Peck v. Burr*, 10 N. Y. 294; *Mitchell v. Smith*, 1 Binn. 110; 4 Dall. 269; *Seidenbender v. Charles*, 4 S. & R. 159; *Eberman v. Reitzel*, 1 W. & S. 181; *Rhodes v. Sparks*, 6 Barr, 473; *Tenney v. Foote*, 4 Ill. App. 594; *Caldwell v.*

to be determined in part by the construction of the contract, in part by the construction of the statute. So far as concerns the contract, if it is susceptible of two probable constructions, one legal and the other illegal, that which is legal is to be preferred.<sup>1</sup> So far as concerns statutes the English rule is "that they should be construed according to the intent of the parliament which passed the act;" provided that the words be "sufficient to accomplish the manifest purpose of the act."<sup>2</sup> In England "the effect of plain and unambiguous words is not to be limited by judicial construction, even though anomalous results should follow,"<sup>3</sup> and the expressions in the books that an act of parliament against "common right," or "natural equity" would be void, are regarded "as warning rather than authority."<sup>4</sup> In this country questions of this class are determined by constitutional limitation, statutes conflicting with constitutional sanctions being inoperative. But here, also, we must fall back on the presumption of legality. If there are two probable constructions of a statute, one of which is constitutional, and the other of which is unconstitutional, the constitutional will be preferred.<sup>5</sup> And, generally, "before we can make out a contract is illegal under a statute we must make out distinctly that the statute has provided that it shall be so."<sup>6</sup>

Contract to  
violate  
statute  
illegal.

Bridal, 48 Iowa, 15; Ryan v. School Dist., 27 Minn. 433; Woods v. Armstrong, 54 Ala. 150; Decell v. Lewenthal, 57 Miss. 331; Cotten v. Mackenzie, 57 Miss. 418. As to simony statutes see Bishop of London v. Ffytche, 1 East, 437; Fletcher v. Soudes, 3 Bing. 501; Goldham v. Edwards, 16 C. B. 437; 18 C. B. 389; Fox v. Bishop of Chester, 6 Bing. 1; and see Smith's L. C. 7th Am. ed. 680.

<sup>1</sup> *Supra*, § 337; *infra*, § 655.

<sup>2</sup> Pollock, 3d ed. 269, citing opinions of the judges in the Sussex Peerage Case, 11 Cl. & F. 143, per Tindal, C.

J., per Lord Brougham, at p. 150. And see per Knight Bruce, L. J., Crofts v. Middleton, 8 D. M. G. 217; per Lord Blackburn, in River Wear Co. v. Adamson, 2 Ap. Cas. 764.

<sup>3</sup> Pollock, 3d ed. 269, citing *Cargo ex Argos*, L. R. 5 P. C. 152.

<sup>4</sup> Pollock, *ut supra*, citing Willes, J., *Lee v. R. R.*, L. R. 6 C. P. 576.

<sup>5</sup> Wh. on Ev. § 1250.

<sup>6</sup> Field, J., L. R. 4 Q. B. D. p. 224. That contracts to violate liquor laws are void, see Whart. Con. of L. §§ 482-497; Taylor v. Pickett, 52 Iowa, 467.

In conflict  
*lex loci solu-*  
*tionis* pre-  
vails.

§ 361. When there is a difference between the laws of the place of contract and of the place of performance, then, when the question is whether the performance of the contract is illegal, the laws of the place of performance are to determine.<sup>1</sup> Thus, a contract made abroad, if not champertous in the place of performance, will not be held champertous in the place of contract.<sup>2</sup> But when an agreement is immoral, or conflicts with national policy according to the *lex fori*, it will not be enforced by the *judex fori*.<sup>3</sup> On the other hand, a vendor, contracting in a place where a sale is lawful, can recover, notwithstanding the resale is to be in a state where the sale is unlawful, unless he is concerned in the resale, or unless the transaction is immoral by the *lex fori*.<sup>4</sup>

§ 362. The prohibition of a statute cannot be evaded by putting a contract in a shape which, while nominally not inconsistent with the statute, virtually contravenes its provisions.<sup>5</sup> This has been frequently held with regard to stipulations evading usury statutes,<sup>6</sup> and with regard to assignments evading bankrupt laws.<sup>7</sup>—If a contract conflicts with the general policy and spirit of a statute governing it, it will not be enforced, although there may be no literal conflict.<sup>8</sup>

<sup>1</sup> Wh. Con. of L. §§ 482–497; Story's Con. of L. §§ 243 *et seq.*; Schlesinger v. Stratton, 9 R. I. 578; Scott v. Duffy, 14 Penn. St. 18. As to usury see *infra*, § 463.

<sup>2</sup> Richardson v. Rowland, 40 Conn. 565; see Grell v. Levy, 16 C. B. N. S. 79; Berrien v. McLane, 1 Hoff. Ch. 421; *infra*, §§ 421 *et seq.*

<sup>3</sup> Wh. Con. of L. § 493; Pollock, 334; Santos v. Illidge, 8 C. B. N. S. 874.

<sup>4</sup> Green v. Collins, 3 Cliff. 494; Hill v. Spear, 50 N. H. 253; Webber v. Donnelly, 33 Mich. 469. In Osborn v. Nicholson, 13 Wall. 656, it was argued by Swayne, J., that a note given for a slave in a state where slavery existed, could be sued out in a state where slavery did not exist. See Roundtree

v. Baker, 52 Ill. 241. And so under the federal constitution, before the abolition of slavery consequent on the late civil war. Com. v. Aves, 18 Pick. 193.

<sup>5</sup> De Begnis v. Armistead, 10 Bing. 107; Booth v. Bank, 7 Cl. & F. 509; Bank U. S. v. Owens, 2 Pet. 27; Eberman v. Reitzel, 1 W. & S. 181.

<sup>6</sup> Evans v. Nagley, 13 S. & R. 218; Marsh v. Robeno, 5 Phila. 190; Manderson v. Bk., 28 Penn. St. 379; see *infra*, §§ 461 *et seq.*

<sup>7</sup> Mackay *ex parte*, L. R. 8 Ch. 643; Williams *ex parte*, L. R. 7 Ch. D. 138; Pierce v. Evans, 61 Penn. St. 415; see *infra*, § 379.

<sup>8</sup> Steaines v. Wainwright, 8 Scott, 280; Craig v. Missouri, 4 Pet. 410;

§ 363. If a statute prohibits an act, it is not necessary, in order to invalidate a contract to do the act, that the statute should provide a penalty.<sup>1</sup> The fact that a thing is prohibited, if it be in the nature of a public wrong, makes its commission an offence; and in any view vitiates a contract for its performance.<sup>2</sup>

Not necessary that penalty should be prescribed.

§ 364. It does not follow, on the other hand, because a statute imposes a penalty on a particular act, that such act is illegal. A penalty may be a mere police tax; it may be equivalent to saying, "You are at liberty to do this, but if you do, you must pay a certain amount to the state." When a penalty is thus in the nature of a tax, a contract to do the act on which the penalty is imposed is not in itself unlawful.<sup>3</sup> When statutory conditions, also, are imposed on the conduct of a business or profession, agreements made without observing these conditions, if no stigma of wrong is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e. g.*, the convenient collection of the revenue, will not be held invalid.<sup>4</sup> Hence, a contract of sale is not void, because the thing sold may be open

Mere penalty imposed does not make an act illegal.

*Bartle v. Coleman*, 4 Pet. 184; *Fuller v. Dame*, 18 Pick. 472; *White v. Bass*, 3 Cush. 449; and other cases cited, 2 Ch. on Cont. 11th Am. ed. 1003.

<sup>1</sup> *Leake*, 2d ed. 723; *Forster v. Taylor*, 5 B. & Ad. 896; *Cope v. Rowlands*, 2 M. & W. 157; *Cork & Youghel R. R. in re*, L. R. 4 Ch. 748; *Cowan v. Milburn*, L. R. 2 Ex. 230; *Combs v. Emery*, 14 Me. 404; *Pattee v. Greely*, 13 Metc. 284; *White v. Bass*, 3 Cush. 449; *Mitchell v. Smith*, 1 Binn. 118; and see *Sussex Peerage Case*, 11 Cl. & F. 148-9, cited *Pollock* (Wald's ed.) 261.

<sup>2</sup> 2 Hawk. c. 25, s. 4; *R. v. Davis*, Say. 163; *R. v. Gregory*, 2 N. & M. 478; 5 B. & Ad. 555; *Mayor of Norwich v. Norfolk R. R.*, 4 E. & B. 397; *Harris v. Runnels*, 12 How. U. S. 80;

*State v. Fletcher*, 5 N. H. 257; *Com. v. Shattuck*, 4 Cush. 141; *Seidenbender v. Charles*, 4 S. & R. 159; *Keller v. State*, 11 Md. 525.

<sup>3</sup> *Leake*, 2d ed. 724; *Johnson v. Hudson*, 11 East, 180; *Gremare v. Valon*, 2 Camp. 144; *Smith v. Mawwood*, 14 M. & W. 463; *Brown v. Duncan*, 10 B. & C. 93; *Bailey v. Harris*, 12 Q. B. 905; *Harris v. Runnels*, 12 How. U. S. 79; *Larned v. Andrews*, 106 Mass. 435.

<sup>4</sup> *Pollock*, 262; *Benj. on Sales*, 3d Am. ed. § 538. That it is otherwise when the object of the statute is to make the contract illegal, see *Larned v. Andrews*, 106 Mass. 435; *Favor v. Philbrick*, 7 N. H. 340; *Schermerhorn v. Tolman*, 4 Kern. 93; and cases cited *infra*, § 365.

to seizure under a license or excise law;<sup>1</sup> nor because the broker or peddler making the sale was not duly licensed, thereby exposing himself to a penalty;<sup>2</sup> nor because the agent was prohibited from acting as such;<sup>3</sup> nor because certain formalities presented by law have not been complied with.<sup>4</sup>

§ 365. But when a statute imposes a penalty, not as a tax, but as a punishment, then a contract to do the thing on which the penalty is imposed is ordinarily unlawful;<sup>5</sup> and so when an act is absolutely prohibited.<sup>6</sup> And when conditions on the exercise of a business are imposed in a statute for the maintenance of public order, or for the protection of parties, or on grounds of public policy, then contracts by such persons, in violation of the statute, are void.<sup>7</sup> Thus it has been held that where a pawn-broker lends money without complying with the statutory requisites, he cannot recover the loan;<sup>8</sup> nor can a foreign

Otherwise  
when act is  
made  
unlawful.

<sup>1</sup> *Bailey v. Harris*, 12 Q. B. 905; *2 Sandf.* 146; *Seidenbender v. Charles Wetherell v. Jones*, 3 B. & Ad. 221.

<sup>2</sup> *Smith v. Linds*, 4 C. B. N. S. 395; *Barclay Coal Co.*, 68 Penn. St. 173; *Johnson v. Hudson*, 11 East, 180; *Woods v. Armstrong*, 54 Ala. 150; see *Jones v. Barry*, 33 N. H. 209; see *Prescott v. Battersley*, 119 Mass. 285. *Lewis v. Welch*, 14 N. H. 294. and cases cited *supra*, § 364.

<sup>3</sup> *Ward v. Smith*, 7 Wall. 447; *Conn v. Penn.* Pet. C. C. 523; *Griswold v. Waddington*, 16 Johns. R. 438; *Chastain v. Bowman*, 1 Hill, S. C. 270; *Lyon v. Kent*, 45 Ala. 656.

<sup>4</sup> *Smith v. Mawwood*, 14 M. & W. 452; see *Aiken v. Blaisdell*, 41 Vt. 655. That a statute which does not absolutely prohibit a thing not in itself immoral, should not be strained beyond its reasonable meaning so as to interfere with liberty, see *Barton v. Muir*, L. R. 6 P. C. 134.

<sup>5</sup> *Drury v. Defontaine*, 1 Taunt. 136; *Bensley v. Bignold*, 5 B. & Al. 335; *Fennell v. Ridler*, 5 B. & C. 406; see *Elkins v. Parkhurst*, 17 Vt. 105; *Com. v. Shattuck*, 4 Cush. 141; *Smith v. Arnold*, 106 Mass. 269; *Larned v. Andrews*, 106 Mass. 435; *People v. Albany*, 11 Wend. 539; *Bell v. Quin*, 514.

<sup>6</sup> *Cope v. Rowlands*, 2 M. & W. 149; see *Bensley v. Bignold*, 5 B. & Ald. 335; *Griffith v. Wells*, 3 Denio, 226; *Schermerhorn v. Tolman*, 4 Kern. 93; *Burkholder v. Beetem*, 65 Penn. St. 496. "A contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition." *Cope v. Rowlands*, 2 M. & W. 149; adopted in *Pollock*, 3d ed. 271. It would be better to say "when such a penalty implies a prohibition." See *De Begnis v. Armistead*, 10 Bing. 110; *S. P. Roby v. West*, 4 N. H. 289; *Mitchell v. Smith*, 1 Binn. 110; *Stanly v. Nelson*, 28 Ala. 514.

<sup>7</sup> *Taylor v. Gas Co.*, 10 Ex. 293; *Ritchie v. Smith*, 6 C. B. 462.

<sup>8</sup> *Fergusson v. Norman*, 5 Bing. N. C. 76.



insurance company without complying with the statutory conditions.<sup>1</sup> When a statute, also, makes a license from two justices a condition precedent to certain kinds of contracts by surveyors of highways, contracts without such license are invalid.<sup>2</sup> Under the act of congress, also, mortgages given to national banks to secure future loans are void;<sup>3</sup> though it is otherwise with loans by national banks to a particular customer in excess of one-tenth of the capital.<sup>4</sup> Where, also, a penalty is imposed on selling by the cord wood not measured by a wood measurer, the object being to prohibit all such sales, a sale of this kind is void, and the seller cannot recover the price;<sup>5</sup> and so of a sale of shingles not of a size permitted by local statute.<sup>6</sup>

§ 366. It may happen that by special legislation a particular class may be subjected to only a limited liability on its contracts. Such legislation has taken place with regard to contracts for labor, and to contracts by sailors; and under the same general head may be considered contracts by infants. The fact, however, that the liability of such parties is limited does not interfere with their right to sue on contracts which are for their own benefit.<sup>7</sup>

Party protected by statute may sue.

§ 367. Statutes prohibiting the performance of contracts, if impairing the obligation of such contracts, are inoperative under the constitution of the United States. It may happen, however, that such statutes are in execution of a power reserved by the state, as where

Agreement cannot be made unlawful by subsequent

<sup>1</sup> *Thorne v. Ins. Co.*, 80 Penn. St. 15.

<sup>2</sup> *Barton v. Piggett*, L. R. 10 Q. B. 86.

<sup>3</sup> *Fowler v. Scully*, 72 Penn. St. 456.

<sup>4</sup> *O'Hare v. Bank*, 77 Penn. St. 96; *Mapes v. Bank*, 80 Penn. St. 163.

<sup>5</sup> *Pray v. Burbank*, 10 N. H. 377.

<sup>6</sup> *Wheeler v. Russell*, 17 Mass. 258.

That the imposition of a penalty on the act stamps the act, so far as concerns parties intelligently concocting it, with illegality, see *Fergusson v. Norman*, 6 Scott, 794; *Houston v. Mills*, 1 M. & R. 325; *Forster v. Tay-*

*lor*, 5 B. & Ad. 896; *Coombs v. Emery*, 14 Me. 404; *Harris v. Runnels*, 12 How. U. S. 80; *Bancroft v. Dumas*, 21 Vt. 456; *Miller v. Post*, 1 Allen, 434; *White v. Bass*, 3 Cush. 449; *Prescott v. Battersly*, 119 Mass. 285; *Griffith v. Wells*, 3 Denio, 226; *Seidenbender v. Charles*, 4 S. & R. 159; *Fowler v. Scully*, 72 Penn. St. 456; *Thorne v. Ins. Co.*, 80 Penn. St. 15; and cases cited 2 Ch. on Cont. 11th Am. ed. 1004.

<sup>7</sup> *Supra*, §§ 2, 353. But see *Hackett v. Chellerton*, *supra*, § 353.

in chartering a corporation, the right to amend its charter is reserved; or it may be that they are in exercise of the right of eminent domain or of other prerogatives to which the constitutional restriction does not apply. Such a statute, if constitutional, is as much a bar to the performance of a contract as it would have been had it been enacted prior to the inception of the contract; and this is also the case with lawful executive action, by which the performance of the contract is made impossible.<sup>1</sup> But where a contract was originally legal, a subsequent statute making it illegal does not discharge an agent appointed under the contract from accounting to his principal.<sup>2</sup> And as a general rule, a contract valid under the laws of a state as expounded at the time it was made is not affected by a subsequent change of judicial opinion as to the validity of such a contract.<sup>3</sup> The courts, also, following the maxim *Communis error facit jus*, will sustain a prevalent construction which may be based on erroneous principles, rather than disturb titles settled under such construction.<sup>4</sup> But, to enable the maxim to operate, the

<sup>1</sup> *Supra*, § 305; Pollock, 340; *Atkinson v. Ritchie*, 10 East, 530; *Brown v. Delano*, 12 Mass. 370; *Barker v. Hodgson*, 3 M. & S. 267; *Esposito v. Bowden*, 7 E. & B. 763.

<sup>2</sup> *Newbold v. Sims*, 2 S. & R. 317.

<sup>3</sup> 1 Dill. Munic. Corp. 146; *Gelpke v. Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678; *Elmwood v. Marcy*, 92 U. S. 291; *Venice v. Murdoch*, 92 U. S. 494; *Walker v. State*, 12 S. C. 200.

<sup>4</sup> *Broom's Maxims*, 5th ed. 139; *Wh. on Ev.* § 1242; *Kostenbader v. Spotts*, 80 Penn. St. 430.

"This" (*communis error facit jus*), "though an admitted legal maxim, is seldom applied in the administration of justice, and never without the utmost caution. The reason is obvious, it permits a misconception to become law in destruction of the real law of the case. In my judgment, no error should be allowed to possess that de-

gree of dignity and force until it has been sanctioned by a tribunal of superior jurisdiction, and subsequently treated as law in the actual business affairs of men. The true rule, I believe, to be this: That no error is entitled to be accepted as law by the courts until it has been declared to be law by a competent judicial decision and afterwards so far adopted in practice that a return to the true law would seriously impair existing interests.

"In *O'Connell v. Queen*, 11 Cl. & F. 373, Lord Denman said: 'When in pursuit of truth we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law if it be irreconcilable with some clear legal principle.'

"And Lord Brougham, in *De Vaynes*

error must not be "floating," but "must have been made the groundwork and substratum of practice."<sup>1</sup>

§ 368. A contract void at the time of its inception cannot be validated by subsequent legislation. And if it violates, when made, a statute, the repeal of that statute does not make it operative.<sup>2</sup>

But void contract cannot be validated.

### III. IMMORALITY.

§ 370. "Contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class (contracts to commit a crime), have always been held to be void."<sup>3</sup> "Generaliter novimus, turpes stipulationes nullius esse momenti."<sup>4</sup>—"Cum omnia, quae contra bonos mores vel in pactum vel in stipu-

Agreements to induce immorality void.

*v. Noble*, 2 Russ. & Myl. 506, said: 'Common or universal error may be said to make the law, especially if the opinion of lawyers and the decisions of judges have been ruled by it.'

"Justice Blackburn says, in *Jones v. Tapling*, 12 C. B. (N. S.) 846: 'There are cases in which a decision originally erroneous has been so long acquiesced in and acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. In such cases the maxim, *communis error facit jus*, may be applied.'

"The error approved in *Morecock v. Dickens*, Amb. 678, was one that had been sanctioned by a prior adjudication. So, too, in *D'Arcy v. Blake*, 2 Sch. & Lef. 387, the error approved by Lord Redesdale was one which prior decisions had made law. He said: 'The decisions to the full extent are so old, so strong, and so numerous, so adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at

this time to alter them.' In my opinion, there is no evidence whatever, in this case, that the error which the complainants insist shall have the force of law, has ever been recognized or applied by any authority competent to give it the force of law." *Runyan, C., Ocean Beach Ass. v. Brinley*, 34 N. J. Eq. 448.

<sup>1</sup> *Isherwood v. Oldnow*, 3 M. & S. 382; *R. v. Sussex*, 2 B. & S. 680; *Phipps v. Ackers*, 9 Cl. & F. 598.

<sup>2</sup> *Milne v. Huber*, 3 McL. 212; *Robinson v. Barrows*, 48 Me. 186; *Ludlow v. Hardy*, 38 Mich. 690; *Anding v. Levy*, 57 Miss. 51; *Decell v. Lowenthal*, 57 Miss. 331; see *Mays v. Williams*, 27 Ala. 267.

<sup>3</sup> *Jessel, M. R., Printing Registering Co. v. Sampson*, L. R. 19 Eq. 465; *S. P. Howson v. Hancock*, 18 T. R. 577; *Lowell v. R. R.*, 23 Pick. 32; *Bredine's App.*, 92 Penn. St. 241; see *White v. Bank*, 22 Pick. 184; *Belding v. Pitkin*, 2 Caines, 149; *Forsythe v. State*, 6 Ohio, 19.

<sup>4</sup> L. 26, de V. O. (45, 1).

lationem deducuntur, nullius momenti sunt.”<sup>1</sup> A printer, in conformity with this rule, cannot recover the price of work done on a libellous book;<sup>2</sup> nor is a promise to indemnify the publisher of such a book binding.<sup>3</sup> In such cases the court, on the immorality of the transaction appearing from the plaintiff’s opening, will refuse to hear the suit.—“The court will not listen to claims founded upon services rendered in violation of common decency, public morality, or the law. History furnishes instances of robbery, arson, and other crimes committed for hire. If after receiving a pardon or suffering the punishment imposed upon him, the culprit should sue the instigator of the crime for the promised reward—if we may suppose that audacity could go so far—the court would not hesitate a moment in dismissing his case and sending him from its presence, whatever might be the character of the defence. It would not be restrained by defects of pleading, nor indeed could it be by the defendant’s waiver, if we may suppose that in such a matter it would be offered. What is so obvious in a case of such aggravated criminality as the one supposed, is equally true in all cases where the services for which compensation is claimed are forbidden by law or condemned by public decency or morality.”<sup>4</sup> It has consequently been held that an action cannot be maintained for a breach of a contract in renting rooms which the owner refused to allow the lessee to use when it appeared that they were to be opened for irreligious lectures.<sup>5</sup>

So of immoral agreements amounting to indictable conspiracies.

§ 371. Wherever an agreement amounts to an indictable conspiracy, it is void when sued on in a civil court. Under this head may be enumerated conspiracies to seduce or to cause to elope, or to de-

<sup>1</sup> L. 6, I. 30, C. de pact. (2, 3). See *Colburn v. Patmore*, 1 C. M. & R. 73; *Worcester v. Eaton*, 11 Mass. 368.

<sup>2</sup> *Poplett v. Stockdale*, Ry. & M. 337.

<sup>3</sup> *Shackell v. Rosier*, 2 Bing. N. C. 634.

<sup>4</sup> *Field, J., Oscany v. Arms Co.*, 103 U. S. 261; cited *infra*, §§ 402, 403.

<sup>5</sup> *Cowan v. Milbourne*, L. R. 2 Exch. 230. “It has never been decided, but

it seems highly probable, that agreements are void which directly tend to discourage the performance of social and moral duties. Such would be a covenant by a landowner to let all his cultivable land lie waste, or a clause in a charter party prohibiting deviation even to save life.” *Pollock*, 3d ed. 323, citing *Cockburn*, C. J., L. R. 5 C. P. D. 305.

bauch;<sup>1</sup> to procure a fraudulent marriage or divorce;<sup>2</sup> to procure an abortion;<sup>3</sup> and to interfere with the rights of sepulture.<sup>4</sup>

§ 372. Wherever a libel would be indictable, then the courts refuse to enforce a contract of which its pre-<sup>So as to</sup>paration or publication is the consideration.<sup>5</sup> Under libels. this head fall indecent and seditious publications, as well as libels on individuals.<sup>6</sup>—Mr. Pollock<sup>7</sup> maintains “that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters; the question in a given case is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral.” In view of the constitutional guarantees in this country of the freedom of the press, this position will be generally accepted in the United States. At the same time it does not follow that because by a local statute publications of a certain class, otherwise libellous, are privileged, the law will enforce an agreement for the issue of such publications. It may be easy, for instance, to conceive of indecent publications in respect to candidates for office, which would be privileged by some of our statutes, but which, as a matter between individuals, would be so steeped in turpitude that no court would give its aid to sustain an agreement for their publication. And we may safely say that no agreement will be sustained for publishing a document that is a libel at common law.—As we have seen, the concurrence of other motives is in such cases no defence.<sup>8</sup>

<sup>1</sup> Wh. Cr. L. 8th ed. § 1361; R. v. 43; Resp. v. Hevice, 2 Yeates, 114; Wakefield, 2 Town. St. Tr. 112; R. v. Cole v. People, 84 Ill. 216; State v. Delaval, 3 Burr. 1435; R. v. Gray, 1 Murphy, 6 Ala. 765.

East, P. C. 460; Mifflin v. Com., 5 W. & S. 461; Anderson v. Com., 5 Rand. (Va.) 627; State v. Savoye, 48 Iowa, 562.

<sup>2</sup> Wh. Cr. L. 8th ed. § 1362; R. v. 337; Gale v. Leckie, 2 Stark. 96.

Wakefield, 2 Town. St. Tr. 112; R. v. Means, 2 Den. C. C. 79; 4 Cox C. C. 423; Com. v. Waterman, 122 Mass.

<sup>3</sup> Com. v. Demain, Brightly's R. 441.

<sup>4</sup> Wh. Cr. L. 8th ed. § 1365.

<sup>5</sup> Stockdale v. Onwhyn, 5 B. & C. 173; Poplett v. Stockdale, Ry. & M.

<sup>6</sup> Wh. Cr. L. 8th ed. §§ 1594 *et seq.*

<sup>7</sup> 3d ed. 286.

<sup>8</sup> *Supra*, § 339.

§ 373. An agreement is void when the consideration is future illicit cohabitation,<sup>1</sup> no matter what other considerations may unite, or how skilfully the illegal object might be cloaked;<sup>2</sup> nor is the agreement made valid by a seal.<sup>3</sup> A promise of marriage on consideration of sexual intercourse also is void.<sup>4</sup> A promise, also, made in compensation for past illicit cohabitation is void for want of consideration;<sup>5</sup> though if made under seal it would bind;<sup>6</sup> and this even though the cohabitation continues after execution of the deed.<sup>7</sup>—And an actual transfer of property in consideration of seduction and of sufferings undergone by the woman, cannot afterwards be impeached by either the party making the settlement or his representatives or assignees.<sup>8</sup>—

<sup>1</sup> Leake, 2d ed. 761; Walker v. Perkins, 1 W. Bl. 517; 3 Burr. 1568; Gray v. Mathias, 5 Ves. 286; Benyon v. Nettlefold, 2 Mac. & G. 94; Coolidge v. Blake, 15 Mass. 429; Trovinger v. McBurney, 5 Cow. 253; Denman v. Douglass, 102 Ill. 341; Walker v. Gregory, 36 Ala. 180.

<sup>2</sup> Hall v. Palmer, 3 Hare, 536.

<sup>3</sup> Walter v. Perkins, *ut supra*; Friend v. Harrison, 2 C. & P. 584.

<sup>4</sup> Beaumont v. Reeve, 8 Q. B. 483; Steinfel v. Levy, 16 Abb. Pr. N. S. 26; Hanks v. Naglee, 54 Cal. 51.

<sup>5</sup> Beaumont v. Reeve, 8 Q. B. 483; Fisher v. Bridges, 3 E. & B. 642; Walker v. Gregory, 36 Ala. 180. See Shenk v. Mingle, 13 S. & R. 29. See *contra*, Smith v. Richards, 29 Conn. 232. And in such case the law of the place of performance binds. Ligeois v. McCrackan, Blatchford, J., 13 Rep. 298.

<sup>6</sup> Gray v. Matthias, 5 Ves. 287; Knye v. Moore, 2 Sim. & St. 260; Brown v. Kinsey, 81 N. C. 245.

<sup>7</sup> Brown v. Kinsey, 81 N. C. 245.

<sup>8</sup> Ayerst v. Jenkins, L. R. 16 Eq. 275; White v. Hunter, 3 Fost. 128; Gisaf v. Neval, 81 Penn. St. 354; and other cases cited Wald's Pollock, 270.

The prevailing distinctions are thus

stated by Lord Selborne, Ayerst v. Jenkins, L. R. 16 Eq. 282 (adopted by Pollock, 3d ed. 280), as follows: "Most of the older authorities on the subject of contracts founded on immoral considerations are collected in the notes to Benyon v. Nettlefold, 3 Mac. & G. 94, 100. Their results may be thus stated: 1. Bonds or covenants founded on past consideration, whether adulterous (Kaye v. Moore, 1 Sim. & S. 61), incestuous, or simply immoral, are valid in law, and not liable (unless there be other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law (Walker v. Perkins, 3 Burr. 1568), and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. 4. If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. Benyon v. Nettlefold, *ut supra*. 5. Under some (but not under all) circumstances, when the consideration is illegal, and does

When a contract for the benefit of the woman is on its face executed, bearing reference exclusively to past cohabitation, and the illicit cohabitation between the parties is resumed, this will not itself vitiate a bond or other sealed instrument of which the past cohabitation is the consideration, unless it should be proved that the averment in the contract that cohabitation was abandoned was put in as a fraud, and that the consideration was really in part future.<sup>1</sup>—A promise by the father of illegitimate children to their mother in consideration of her taking care of them is good.<sup>2</sup>—Promises to support illegitimate children are hereafter distinctively discussed.<sup>3</sup>

§ 374. Nor can a party recover the price of goods supplied for an immoral purpose.<sup>4</sup> Thus, the price of goods sold for the purpose of carrying on a house of ill-fame cannot be recovered,<sup>5</sup> nor can the rent of a house for the same purpose.<sup>6</sup> In such cases, however, the *scienter* must be established, and it must be shown that the intention of the vendor or the lessor was to further the commission of the wrong, and that this was the object of the bargain.<sup>7</sup> If these conditions exist, an assignor

So as to goods or houses furnished for immoral purposes.

not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity."

It should be added that, as in this country illicit cohabitation is an indictable offence, agreements to encourage it are invalid, exclusive of other grounds, on the ground of this indictability.

<sup>1</sup> *Gray v. Matthias*, 5 Ves. 286; *Hall v. Palmer*, 3 Hare, 532; *Shenk v. Mingle*, 13 S. & R. 29; *Cusack v. White*, 2 Const. St. Rep. 285; *Brown v. Kinsey*, 81 N. C. 245. A covenant, by parties who have been living in illicit cohabitation, but who have separated, for an annuity to the woman with a proviso that it cease upon the parties living together again, is valid; though the proviso is void. *Naden æ parte*, L. R. 9 Ch. 670.

<sup>2</sup> *Smith v. Roche*, 6 C. B. (N. S.) 223.

As to agreements of this kind, see *infra*, § 525; *Stephens v. Spiers*, 25 Mo. 386; *Thompson v. Nelson*, 28 Ind. 481.

<sup>3</sup> *Infra*, § 525.

<sup>4</sup> See *infra*, §§ 707 *et seq.*

<sup>5</sup> *Hamilton v. Grainger*, 5 H. & N. 40; *Pearce v. Brooks*, L. R. 1 Ex. 213.

<sup>6</sup> *Supra*, § 348; *Leake*, 2d ed. 762; *Girarday v. Richardson*, 1 Esp. 13; *Appleton v. Campbell*, 2 C. & P. 347; *Jennings v. Throgmorton*, Ry. & M. 251; *U. S. v. Gray*, 2 Cranch C. C. 675; *Com. v. Harrington*, 3 Pick. 26; *Riley v. Jordan*, 122 Mass. 231; *Dyott v. Pendleton*, 8 Cow. 727; *Smith v. State*, 6 Gill, 425; *State v. Potter*, 30 Iowa, 587.

<sup>7</sup> *Appleton v. Campbell*, 2 C. & P. 347; *Bowry v. Bennett*, 1 Camp. 348; *Lloyd v. Johnson*, 1 B. & P. 340; *Jennings v. Throgmorton*, Ry. & M. 251; *State v. Williams*, 1 Vroom, 102.

of a house habitually used as a house of ill-fame cannot recover upon the indemnity of the assignee against breaches of covenant in the lease in respect of dilapidations.<sup>1</sup>

#### IV. CHEATING AND FRAUDULENT INSOLVENCY.

§ 376. A conspiracy to defraud being indictable at common law, all agreements to effect such a conspiracy are invalid.<sup>2</sup> This rule is applicable to conspiracies to cheat by a mock auction;<sup>3</sup> to conspiracies to raise public funds by false rumors;<sup>4</sup> to conspiracies to issue bills in name of fictitious or illegal banks;<sup>5</sup> to conspiracies to obtain goods on false pretences or tricks;<sup>6</sup> to conspiracies to make a person drunk and then obtain his money;<sup>7</sup> to conspiracies to make money by false personation;<sup>8</sup> to conspiracies to manufacture a spurious drug;<sup>9</sup> to conspiracies to obtain money by coercion;<sup>10</sup> to contracts by a company to pay unearned dividends.<sup>11</sup> The party whom such conspiracies are designed to injure may, at his election, avoid any contract induced by such conspiracy.<sup>12</sup> Under the same head are to be included all contracts whose object is to defraud

Agree-  
ments to  
defraud  
voidable.

<sup>1</sup> *Smith v. White*, L. R. 1 Eq. 626; *Leake*, 2d ed. 764; *Riley v. Jordan*, 122 Mass. 231.

<sup>2</sup> See *Wh. Cr. L.* 8th ed. §§ 1347 *et seq.*; *Steinburg v. Bowman*, 103 Mass. 325; *Moore v. Wood*, 100 Ill. 451; *Martin v. Bolton*, 75 Ind. 295; *Harwood v. Knepper*, 50 Mo. 456.

<sup>3</sup> *R. v. Lewis*, 11 Cox, C. C. 404.

<sup>4</sup> *R. v. De Berenger*, 3 M. & S. 67.

<sup>5</sup> *R. v. Hevey*, 2 East, P. C. 858; *Twitchell v. Com.*, 9 Penn. St. 211; *Wh. Cr. L.* 8th ed. § 1357.

<sup>6</sup> *McKewan v. Sanderson*, L. R. 15 Eq. 229; *R. v. Aspinall*, L. R. 1 Q. B. D. 735; *R. v. Heymann*, L. R. 8 Q. B. 102; *Harrington v. Dock Co.*, L. R. 3 Q. B. D. 549; *R. v. Kenrick*, 5 Q. B. 49; *Jackson v. Ludeling*, 21 Wall. 616; *State v. Bartlett*, 30 Me. 132; *Com. v. Warren*, 6 Mass. 72; *Fuller v. Dame*, 18 Pick. 472; *Rice v. Wood*,

113 Mass. 133; *Bliss v. Matteson*, 45 N. Y. 22; *Com. v. McKisson*, 8 S. & R. 420; *State v. Buchanan*, 5 Har. & J. 317; *Bloomer v. State*, 48 Md. 521; *Byrd v. Hughes*, 84 Ill. 174; *People v. Richards*, 1 Mich. 216; *Powell v. Inman*, 8 Jones, N. C. 436; *Heineman v. Newman*, 55 Ga. 262; *Fenton v. Ham*, 35 Mo. 409. That fraudulent coöperation on part of vendee is essential, see *Beurmann v. Van Buren*, 44 Mich. 496.

<sup>7</sup> *State v. Younger*, 1 Dev. 357.

<sup>8</sup> *R. v. Robinson*, 1 Leach, 44.

<sup>9</sup> *Com. v. Judd*, 2 Mass. 329.

<sup>10</sup> *State v. Shooter*, 8 Rich. 72.

<sup>11</sup> *Lockhart v. Van Alstyne*, 14 Am. Law Reg. 180; *Culver v. Reno Real Est.*, 91 Penn. St. 367.

<sup>12</sup> *Jackson v. Duchaire*, 3 T. R. 551; *Willis v. Baldwin*, 2 Doug. 450; *Begbie v. Phosp. Co.*, L. R. 1 Q. B. D. 679.



creditors of their just rights.<sup>1</sup> And no resulting trust will be permitted to arise from a settlement in fraud of creditors.<sup>2</sup>

<sup>1</sup> See cases cited to §§ 379 *et seq.*; and further, to the effect that all conveyances in fraud of creditors are void, *Huse v. Preston*, 51 Vt. 245; *Blant v. Gabler*, 77 N. Y. 461; *Southard v. Benner*, 72 N. Y. 424; *Miller v. Sauerbier*, 30 N. J. Eq. 71; *Budd v. Atkinson*, 30 N. J. Eq. 530; *Bunn v. Ahl*, 29 Penn. St. 387; *Blystone v. Blystone*, 51 Penn. St. 373; *Brockenbrough v. Brockenbrough*, 31 Grat. 580; *McQuade v. Rosecrans*, 36 Oh. St. 442; *Appleton Bk. v. Bertschey*, 52 Wis. 438; *Crapster v. Williams*, 21 Kan. 109; *Annis v. Bonar*, 86 Ill. 128; *Tobey v. Robinson*, 99 Ill. 222; *Harrison v. Bailey*, 14 S. C. 334; *Marshall v. Croom*, 60 Ala. 121; *Horn v. Wiatt*, 60 Ala. 297; *Sattler v. Marino*, 30 La. An. Pt. I. 355; *Fisher v. Lewis*, 69 Mo. 629. In *Blennerhasset v. Sherman*, Sup. Ct. U. S. 1882, it is said by Woods, J.: "It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage."

"But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers the mortgagor's entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these

means others are induced to give credit to the mortgagor, who fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor.

"It is not enough in order to support a settlement against creditors that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay, or defraud creditors, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. (*Twyne's case*, 3 Co. Rep. 81; *Holmes v. Penney*, 3 Kay & J. 99; *Gragg v. Martin*, 12 Allen, 498; *Brady v. Briscoe*, 2 J. J. Marsh. 212; *Bozman v. Draughn*, 3 Stew. 243; *Farmers' Bank v. Douglass*, 11 Sme. & Mar. 469; *Bunn v. Ahl*, 29 Penn. St. 387; *Root v. Reynolds*, 32 Vt. 139; *Kempner v. Churchill*, 8 Wall. 362; *Kerr on Fraud and Mistake*, 200.)

"As long ago as the case of *Hungerford v. Earle*, 2 Vern. 261, it was held that 'a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money.' This doctrine has been repeatedly reaffirmed. (*Chancellor Kent in Hildreth v. Sands*, 2 Johns. Ch. 35; *Scrivenor v. Scrivenor*, 7 B. Mon. 374; *Bank of the United States v. Housman*, 6 Paige, 526)."

<sup>2</sup> *Perry on Trusts*, 131; 1 Lead. Cas. in Eq. 320; *Murphy v. Hubert*, 16 Penn. St. 56; *infra*, § 377; see *Lynch's App.*, 97 Penn. St. 349.

§ 377. The subject of voidability of fraudulent conveyances is one which can only be treated in outline in such a work as the present. The following points, however, may be specifically noticed:—

1. *Intent to defraud is the test of voidability.* If the object of a sale be to defraud creditors, no matter what consideration was paid by the purchaser, the sale must be set aside.<sup>1</sup>

2. *Fraud is to be inferred from all the circumstances of the case.*<sup>2</sup> For this purpose other acts of fraud, forming part of the same system, are admissible.<sup>3</sup> Want of consideration is an important ingredient of proof in such an issue. Supposing a party knows himself to be insolvent, the fact of his parting with valuable property without consideration is naturally to be imputed to a desire to withdraw such property from his creditors' grasp. Hence, as a rule, all voluntary conveyances with intent to hinder creditors are void; and this is the rule prescribed by the statute of Elizabeth, with the proviso that *bona fide* transfers for a good consideration are not thereby to be avoided. But to bring a transfer under the proviso, it must not merely be for a good consideration; it must also be in good faith.<sup>4</sup> Whenever an intention to defraud can be shown,

<sup>1</sup> *Twyne's case*, 1 Sm. Lead. Cas. 7th Am. ed. 33 *et seq.*, where there is a full exposition of state legislation down to 1572; *Chandler v. Van Rader*, 24 How. U. S. 224; *Kempner v. Churchill*, 8 Wall. 362; *Blennerhasset v. Sherman*, Sup. Ct. U. S. 1882, 26 Alb. L. J. 116, cited *supra*, § 377; *Robinson v. Holt*, 39 N. H. 557; *Bridge v. Eggleston*, 14 Mass. 245; *Harrison v. Phillips Acad.*, 12 Mass. 456; *Gragg v. Martin*, 12 Allen, 498; *Wadsworth v. Williams*, 100 Mass. 126; *Levick v. Brotherline*, 74 Penn. St. 149; *Harrison v. Jaquess*, 29 Ind. 208; *Henry v. Hinman*, 25 Minn. 199; *Thorpe v. Thorpe*, 12 S. C. 154.

<sup>2</sup> *Supra*, § 239; see Wh. on Ev. § 33, and cases there cited; *Towne v. Fiske*, 127 Mass. 125; *Blaug v. Gabler*, 77 N. Y. 461; *Sandlin v. Robbins*, 62 Ala. 477; *Harman v. Hoskins*, 56 Miss. 142.

<sup>3</sup> Wh. on Ev. §§ 38 *et seq.*

<sup>4</sup> *Bispham's Eq.* § 243; and see generally as to inference of fraud, *Huntingford v. Massey*, 1 F. & F. 690; *Lincoln v. Claffin*, 7 Wal. 132; *Cragin v. Tarr*, 32 Me. 55; *Knight v. Heath*, 23 N. H. 410; *Pierce v. Hoffman*, 24 Vt. 525; *Cook v. Moore*, 11 Cush. 216; *Stockwell v. Silloway*, 113 Mass. 384; *Horton v. Weiner*, 124 Mass. 92; *Cary v. Hotailing*, 1 Hill, 311; *Booth v. Powers*, 56 N. Y. 22; *Brown v. Shock*, 77 Penn. St. 471; *Brinks v. Heise*, 84 Penn. St. 246; *Battles v. Laudenslager*, 84 Penn. St. 446; *McAleer v. Horsey*, 35 Md. 439; *Brink v. Black*, 77 N. C. 59; *Spivey v. Wilson*, 31 La. An. 653; *King v. Moon*, 42 Mo. 551; *Williams v. Barnett*, 52 Tex. 130.

In *Lehman v. Kelly*, Sup. Ct. Ala. 1881, we have the following from

then an agreement to effect such intention will be held void.<sup>1</sup> So far as concerns frauds on creditors, the principle which is adopted in the Roman law, and which was part of the old English common law, was affirmed by the statutes of 50 Edward III. ch. 6, of 3 Henry VII. ch. 4, of 13 Elizabeth, ch. 5, and of 27 Elizabeth, ch. 4, by which gifts and conveyances for the purpose of defrauding creditors were pronounced void. These

Stone, J. . "In *Crawford v. Kirksey*, 55 Ala. 282, 293, speaking of sales upon a new consideration, and not in payment of a debt, we, after mature consideration, announced the following proposition: 'If the seller be insolvent, or in failing circumstances, and the purchaser knows, or is in possession of information reasonably calculated to stimulate inquiry, and which, if followed up, would lead to the discovery that the purpose of the seller is to put his property beyond reach, or otherwise to delay, hinder, or defraud his creditors, then a purchase under these circumstances, though full consideration is paid, is invalid as against creditors. But, if the purchase be made without such knowledge and without such information as reasonably to put him on inquiry, he acquires a good title, no matter how fraudulent the intent of the seller.' In *Covanhovan v. Hart*, 21 Penn. St. 495, Chief Justice Black declared the principle in the following language: 'If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser, and he, nevertheless, aids and assists in executing it, his title is worthless as against creditors, though he may have paid a full price.' *Hopkins v. Langton*, 30 Wis. 379. It will be seen that under those authorities a sale, such as we are considering, is fraudu-

lent and inoperative, if intended by an insolvent seller to delay, hinder, or defraud his creditors, and that intent be known to the purchaser, or if he be in possession of information reasonably calculated to stimulate inquiry, and which, if followed up, would lead to a discovery of the seller's fraudulent purpose. The underlying morals on which this sound principle rests are, that it is the legal duty of every debtor to keep his property open to the claims of his creditors and to make no effort to secrete it, or to sell it otherwise than for the honest purpose of paying his debts. If he secrete his property, or if he sell it with the intent or purpose of delaying, hindering, or defrauding his creditors—either one of the three purposes stamps his conduct as fraudulent, even if he sells for the full value, and the purchaser, although paying full value, acquires no valid title against the vendor's creditors if he aid him in consummating the fraud. He renders sufficient aid to invalidate his purchase when he knows the seller's fraudulent intention in making the sale, or has knowledge of facts and circumstances naturally and justly calculated to awaken suspicion in the mind of a man of ordinary care and prudence of the fraudulent intent of the seller. The cases of *Brown v. Foree*, 7 B. Mon. 357, and *Brown v. Smith*, ib. 361, cannot be followed."

<sup>1</sup> Story's Eq. Jur. 12th ed. §§ 350 *et seq.*

statutes, recapitulating as they do sound ethical principles as well as rules of the Roman and old English law, have been liberally construed by the English courts. In this country, when not expressly re-enacted, they have been held in force as part of the common law.<sup>1</sup>

3. *Consideration must be valuable.* This excludes mere moral obligations,<sup>2</sup> though it is otherwise as to obligations founded on antecedent legal indebtedness; and hence a party may waive the benefit of a statute relieving him from legal liability.<sup>3</sup> A marriage is a valuable consideration, so that a settlement made by a man on his intended wife, in consideration of marriage, is good, although he was insolvent at the time, unless the object was to defraud his creditors.<sup>4</sup> But this does not preclude suitable settlements made by a solvent party on his family when he is engaged in a business not involving large hazards, such settlements not being made to prevent any probable contingent liability.<sup>5</sup> It is otherwise when the party making the settlement either knows or ought to know himself to be insolvent.<sup>6</sup> But "mere indebtedness," says Judge Story, after noticing the divergency of views in the earlier cases, "would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the

<sup>1</sup> Hamilton v. Russell, 1 Cranch, 309; Clements v. Moore, 6 Wall. 299; Clark v. Douglass, 62 Penn. St. 408; see notes to Twyne's case, 1 Sm. Lead. Cas. 7th Am. ed.; 2 Kent's Com. 440; notes to Sexton v. Wheaton, 1 Am. Lead. Cas. 58.

<sup>2</sup> *Infra*, §§ 497, 512.

<sup>3</sup> *Infra*, § 513; Bump on Fraud. Conv. 249.

<sup>4</sup> Fraser v. Thompson, 1 Giff. 49; Reade v. Livingston, 3 Johns. Ch. 489; Tomlinson v. Matthews, 98 Ill. 175; see *infra*, § 537, where this topic is discussed.

<sup>5</sup> See Ware v. Gardner, L. R. 7 Eq. 317; Townsend v. Westacott, 2 Beav. 340; Sexton v. Wheaton, 8 Wheat. 229, and notes 1 Am. Lead. Cas. 57; Mattingly v. Nye, 8 Wall. 370; Brackett

v. Waite, 4 Vt. 389; 6 Vt. 411; Salmon v. Bennett, 1 Conn. 525; Jackson v. Town, 4 Cow. 599; Mellon v. Mulvey, 8 C. E. Green, 198; Benedict v. Montgomery, 7 W. & S. 238; Ammon's App., 63 Penn. St. 284; Williams v. Davis, 69 Penn. St. 21; Morris v. Ziegler, 71 Penn. St. 450; Monroe v. Smith, 79 Penn. St. 459; Frank v. Welch, 89 Ill. 38; Huston v. Cantril, 11 Leigh, 136; Duhme v. Young, 3 Bush, 343; Laird v. Scott, 5 Heisk. 314; Harrell v. Mitchell, 61 Ala. 270.

<sup>6</sup> Townshend v. Windham, 2 Ves. 10; Holloway v. Millard, 1 Mad. 414; Wickes v. Clarke, 8 Paige, 161; Kane v. Roberts, 40 Md. 590; Patten v. Casey, 57 Mo. 118; Power v. Alston, 93 Ill. 587; Wake v. Griffin, 9 Neb. 47.

other circumstances of the case justly created a presumption (or more properly, to use Lord Mansfield's term, 'argument' or 'inference') of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors."<sup>1</sup> An important additional element of fraud in such cases is the reservation of any secret benefit to the grantor.<sup>2</sup>

4. *Insolvency essential; or intention to take great risks.* As a condition of fraudulent intention, insolvency, known to the grantor, must be shown. A party who believes himself to have the pecuniary ability to make a gift, can make such gift without the risk of its being subsequently impeached, supposing his belief is not negligently adopted.<sup>3</sup> The intention to enter into a hazardous business, also, may cast the suspicion of fraud on any settlements made with a view of protecting the grantor's property from the contingency of loss in such business, if such settlements were unsuitable to the circumstances of the party making them, and if they were concealed from parties trusting him on the faith of his supposed possession of the assigned estate.<sup>4</sup> But indebtedness alone does not prejudice such a settlement, supposing the settlement to be reasonable, as there is no one who does not owe some debts. If, however, such debts are so great as to constitute probable insolvency, and if the grantor is or ought to be conscious of this fact; and if concealment or other modes of unfairness be shown; then an intent to defraud may be inferred. The question is one of inductive reasoning.<sup>5</sup> "A fair voluntary conveyance," justly says Lord Mansfield, "may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted, at the time of his making a voluntary conveyance, is an *argument* of fraud. The question in every case, therefore, is, whether the act done is a *bona*

<sup>1</sup> To this is cited *Gale v. Williamson*, 8 M. & W. 405. *Freeman v. Pope*, L. R. 5 Ch. 538; *Smith v. Cherrill*, L. R. 4 Eq. 390.

<sup>2</sup> *Egery v. Johnson*, 70 Me. 258; *Donovan v. Dunning*, 69 Mo. 436; see *Franklin v. Claflin*, 49 Md. 24. <sup>4</sup> *Mackay v. Douglass*, L. R. 14 Eq. 106; *Tanqueray v. Bowles*, L. R. 14 Eq. 151; *Kent v. Riley*, L. R. 14 Eq. 190.

<sup>3</sup> *Bispham's Eq.* § 245; *Bump, Fraud*. Con. 291; *Jenkyn v. Vaughan*, 3 Dr. 425; *Kent v. Riley*, L. R. 14 Eq. 190; <sup>5</sup> *Wh. on Ev.* § 33.

*fide* transaction, or whether a trick or contrivance to defeat creditors."<sup>1</sup> According to Chancellor Kent, as followed by Judge Story,<sup>2</sup> "if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts (that is, those antecedently due), and no circumstances will permit those debts to be affected by the settlement, or repel the *legal presumption* of fraud. The *presumption of law* in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous, to the rights of creditors, and might form an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts." Adding to this, "debts about to be incurred in view of the assignment," and inserting in the place of the words italicized "*inference*" (the conclusions being inductive, from a survey of all the facts in the case, and not a presumption of law),<sup>3</sup> the view thus expressed not only accords with that of Lord Mansfield, but is sustained by right reason and recent adjudications.<sup>4</sup>

5. *Choses in action are subject to same rule.* In England choses in action were held not within the statute of Elizabeth.<sup>5</sup> This, however, is now corrected by statute;<sup>6</sup> and in this country this distinction between choses in action and other species of property cannot be said ever to have existed.<sup>7</sup>

6. *Conveyances good against fraudulent grantor.* Only creditors, or subsequent purchasers, can, as a general rule, set aside such conveyances.<sup>8</sup> The grantor, as a party to the fraud, can-

<sup>1</sup> Lord Mansfield, *C. J.*, *Cadogan v. Kennett*, Cowp. 434. 106; *McLaughlan v. Bank*, 7 How. U. S. 220; *Sparkman v. Place*, 5 Ben. 184;

<sup>2</sup> *Reed v. Livingston*, 3 Johns. Ch. 500; *Story's Eq. Jur.* 12th ed. § 359. *Cornwall in re*, 9 Blatch. 116; *Summers v. Hoovey*, 42 Ind. 153.

<sup>3</sup> See Wh. on Ev. §§ 1226 *et seq.* 1248.

<sup>5</sup> *Story's Eq. Jur.* 12th ed. § 246.

<sup>6</sup> *Stokel v. Cowan*, 29 Beav. 637.

<sup>7</sup> *Bispham's Eq.* § 246.

<sup>4</sup> *Jenkyn v. Vaughan*, 3 Drew. 419; *Crossley v. Ellworthy*, L. R. 12 Eq. 158; *Freeman v. Pope*, L. R. 5 Ch. Ap. 538; *Mackay v. Douglass*, L. R. 14 Eq. 106; *McLaughlan v. Bank*, 7 How. U. S. 220; *Sparkman v. Place*, 5 Ben. 184; *Cornwall in re*, 9 Blatch. 116; *Summers v. Hoovey*, 42 Ind. 153.

<sup>8</sup> *Bispham's Eq.* §§ 248-251; *Story's Eq. Jur.* 12th ed. § 371; as to *bona fide* purchasers see §§ 211, 291, 347, 376.

not obtain the aid of the courts to get rid of the obligation of such a conveyance, though it could not be enforced against him.<sup>1</sup> Nor can third parties, unless they are parties defrauded, impeach such conveyances.<sup>2</sup>

§ 378. An agent is not allowed to make profit out of his agency, beyond his fixed salary or commissions, to his principal's detriment; and hence any contracts by an agent for purchase of principal's property or for investment of principal's assets enure to the principal's benefit, or may be repudiated so far as concerns the agent and parties with notice, at the principal's election, unless it should appear that the purchase or investment was made with the principal's full approval, on a full knowledge of the facts.<sup>3</sup> A contract which creates an interest adverse to the interest of the *cestui que trust* is void as against public policy.<sup>4</sup> And, as a general rule, it is against public policy to allow persons occupying fiduciary relations to be placed in positions in which their interests and that of the trust would come in collision.<sup>5</sup>

Contract of an agent to his private profit void against the principal.

§ 379. The object of the bankrupt statutes being the equal distribution of the bankrupt's estate among all his creditors,

<sup>1</sup> *Supra*, § 340; *Petre v. Espinasse*, 2 My. & K. 496; *Chapin v. Pease*, 10 Conn. 69; *Hubbell v. Currier*, 10 Allen, 333; *Bonslough v. Bonslough*, 68 Penn. St. 495.

<sup>2</sup> *Curtiss v. Price*, 12 Ves. 103; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Jackson v. Garnsey*, 16 Johns. 189; *Reichart v. Castator*, 5 Binn. 109; *Harmon v. Harmon*, 63 Ill. 512; *Clemens v. Clemens*, 28 Wis. 637.

<sup>3</sup> *Wh. on Agency*, §§ 231, 573, 760; *Lees v. Nuttall*, 2 Myl. & K. 819; *Lowther v. Lowther*, 13 Ves. 95; *Dunne v. English*, L. R. 18 Eq. 524; *Mollett v. Robinson*, L. R. 5 C. P. 653; *Provost v. Gratz*, 6 Wheat. 481; *Marsh v. Whitmore*, 21 Wall. 178; *Ringo v. Binns*, 10 Pet. 269; *Baker v. Humphrey*, 101 U. S. 494; *Mott v. Harrington*, 12 Vt. 199; *Smith v. Townsend*, 109 Mass. 500; *Taussig v. Hart*, 58 N.

Y. 428; *Fulton v. Whitney*, 66 N. Y. 548; *Lorillard v. Clyde*, 86 N. Y. 384; *Condit v. Blackwell*, 22 N. J. Eq. 486; *Myers' Ap.*, 2 Barr. 463; *Everhart v. Searle*, 71 Penn. St. 256; *Piatt v. Longworth*, 27 Oh. St. 159; *Kruse v. Steffens*, 47 Ill. 112; *Eldridge v. Walker*, 60 Ill. 230; *Mason v. Bauman*, 62 Ill. 76; *Ackenburgh v. McCool*, 36 Ind. 473; *Firestone v. Firestone*, 49 Ala. 128; *Gaines v. Allen*, 58 Mo. 541. See *supra*, § 161, where the subject is examined in its relation to undue influence.

<sup>4</sup> *Bowers v. Bowers*, 26 Penn. St. 74; *Foll's Ap.*, 91 Penn. St. 434.

<sup>5</sup> *Aberdeen R. R. v. Blaikie*, 1 Macq. H. L. 461; *Risley v. R. R.*, 62 N. Y. 240; *Barnes v. Brower*, 80 N. Y. 527; *Gardner v. Butler*, 30 N. J. Eq. 703. As to sales or other provisions of trusts, see *infra*, § 408.

any agreement with any particular creditor, by which, in consideration of acts done by him, he is to obtain a covert preference over other creditors, is void.<sup>1</sup> Hence a security taken by a creditor, in view of the debtor's bankruptcy, to be valid only in case of bankruptcy, will not be sustained;<sup>2</sup> and so where the device used was the attornment of the debtor to his mortgagee at an excessive rent,<sup>3</sup> and so of other contrivances to give any particular creditor an unfair preference in distribution.<sup>4</sup> Contracts to remove goods from the bankrupt's creditors are also void.<sup>5</sup> It has been held in England, also, that the assent of a majority of creditors to a composition, must, in order to bind the minority, be *bona fide*.<sup>6</sup> And in this country a state court will not enforce an executory contract in violation of the federal bankrupt law.<sup>7</sup>

<sup>1</sup> Leake, 2d ed. 730; *Mare v. Sandford*, 1 Giff. 288; *McKewan v. Sander-son*, L. R. 20 Eq. 65; *Elliott v. Richardson*, L. R. 5 C. P. 744; *Wilson v. Prewett*, 3 Woods, 631; *Wilson v. Jordan*, 3 Woods, 642; *Sawyer in re*, 14 N. Bank. Reg. 24; *Whitney in re*, 14 N. Bank. Reg. 3. That evasions of bankrupt law invalidate, see *supra*, § 362.

"A mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the bankrupt act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

"If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under

the letter of the bankrupt act. Where all the other circumstances necessary to render the mortgage void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and void as against its spirit." *Woods, J., Blennerhasset v. Sherman*, Sup. Ct. U. S. 1882. This was so under the United States Bankrupt Act of 1867, Rev. Stat. § 5132.

<sup>2</sup> *Mackay ex parte*, L. R. 8 Ch. 643.

<sup>3</sup> *Jackson ex parte*, L. R. 14 Ch. D. 725.

<sup>4</sup> *Gomersall in re*, L. R. 1 Ch. D. 137.

<sup>5</sup> *Heymann v. R.*, L. R. 8 Q. B. 102; 12 Cox, C. C. 383; *U. S. v. Bayer*, 4 Dill. 407.

<sup>6</sup> *Cowen ex parte*, L. R. 2 Ch. 563; *Cobb ex parte*, L. R. 8 Ch. 727; *Linsley ex parte*, L. R. 9 Ch. 290; *Page ex parte*, L. R. 2 Ch. D. 323.

<sup>7</sup> *Blaisdel v. Fowle*, 120 Mass. 447; *Austin v. Markham*, 44 Ga. 161; *Claf- lin v. Torlina*, 56 Mo. 369; *Lowtham v. Stillwell*, Sup. Ct. Mo. 1882.



§ 380. The essence of insolvent releases being equality, the law avoids a secret agreement with any particular creditor by which, in consideration of a release by him, he is to obtain peculiar advantages.<sup>1</sup> Hence, securities given without the assent of the other creditors to induce a creditor to assent to a release, are void.<sup>2</sup> When such a fraudulent preference is obtained, the creditor cannot recover even the amount of his composition, the whole transaction being vitiated by the fraud.<sup>3</sup> The debtor, also, is precluded from maintaining any claim against the creditor on the composition thus fraudulently concocted.<sup>4</sup> Any reservation of indebtedness, by a creditor, on executing a composition deed, will be fraudulent, as to other creditors, so far as concerns any claim by the creditor to recover on ground of the indebtedness reserved;<sup>5</sup> though one creditor may, with consent of the other creditors, exclude a portion of his claim from the composition.<sup>6</sup> Other creditors are not bound by releases they are thus induced to execute;<sup>7</sup>

Agreements in insolvency for preferences to particular creditors void.

<sup>1</sup> *Cockshott v. Bennett*, 2 T. R. 763; *Britton v. Hughes*, 5 Bing. 466; *Mallalieu v. Hodgson*, 16 Q. B. 711; *Clark v. White*, 12 Pet. 178; *Huntington v. Clark*, 39 Conn. 540; *Bliss v. Matteson*, 45 N. Y. 22; *Bixby v. Carskaddon*, 55 Iowa, 533.

<sup>2</sup> *Leake*, 2d ed. 767; *Jackman v. Mitchell*, 13 Ves. 581; *Leicester v. Rose*, 4 East, 372; *Wells v. Girling*, 1 B. & B. 447; *Wood v. Barker*, L. R. 1 Eq. 139; *McKewan v. Sanderson*, L. R. 20 Eq. 65; *Bissell v. Jones*, L. R. 4 Q. B. 49; *Crossley v. Moore*, 40 N. J. L. 27; *Baker v. Matlack*, 1 Ashm. 68; *Way v. Langley*, 15 Oh. St. 392.

<sup>3</sup> *Howden v. Haigh*, 11 A. & E. 1033; see *Sternburg v. Bowman*, 103 Mass. 325.

<sup>4</sup> *Higgins v. Pitt*, 4 Ex. 317; *Wald's Pollock*, 248; citing *Bell v. Leggett*, 7 N. Y. 176.

<sup>5</sup> *Harphy v. Wall*, 1 B. & Ald. 103; see *Britton v. Hughes*, 5 Bing. 460; *Harvey v. Hunt*, 119 Mass. 279.

<sup>6</sup> *Woods v. De Mattos*, L. R. 1 Ex. 91.

<sup>7</sup> *Danglish v. Tennent*, L. R. 2 Q. B. 49; *Pulsford v. Richards*, 22 L. J. Ch. 559; *Partridge v. Messer*, 14 Gray, 180.

"A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between creditors upon

and an assignment fraudulently obtained does not preclude creditors releasing on accepting it from attacking it or proceeding otherwise against the debtor.<sup>1</sup> Any stipulation by an assignor by which the trustee or insolvent assignee is to secretly reserve a benefit to the assignor in fraud of the creditors, is void;<sup>2</sup> nor is it any reply that the promise of preference was made by an attorney outside of the range of his duties, or that it was kept secret from the debtor until after final settlement.<sup>3</sup>—But unless in contemplation of bankruptcy, or of statutory insolvency, or unless as part of a system of fraudulent composition, a debtor may lawfully prefer one creditor to another.<sup>4</sup>

#### V. VIOLATING SUNDAY LAW.

§ 382. By the statute of 29 Car. II. c. 7, s. 1, it is enacted that “no tradesman, artificer, workman, laborer, or other person shall do or exercise any worldly labor, business, or work of their ordinary callings, upon the Lord’s day, works of necessity and charity only excepted.” Business contracts made on Sunday have been in consequence held to be void.<sup>5</sup> Statutes to the same effect exist in this country, and have been held constitutional;<sup>6</sup> and

Sunday  
contracts  
in most  
states void.

which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction.” *Solinger v. Earle*, 82 N. Y. 393, 396. As to cases of preferences under bankrupt law, see *supra*, § 379.

<sup>1</sup> *Danglish v. Tennent*, L. R. 2 Q. B. 49. See *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 T. R. 166.

<sup>2</sup> *Blacklock v. Dobie*, L. R. 1 C. P. D. 265; *Yeomans v. Chatterton*, 9 Johns. 295; *Wiggin v. Bush*, 12 Johns. 306; *Passmore v. Eldredge*, 12 S. & R. 198; *McClurg v. Lecky*, 3 Pen. & W. 83; *Connelly v. Walker*, 45 Penn. St. 449.

<sup>3</sup> *Bank of Commerce v. Hoebner*, 14 Cent. L. J. 293.

<sup>4</sup> *Hopkins v. Beebe*, 26 Penn. St. 85; *York Bank v. Carter*, 38 Penn. St. 446; *Bentz v. Rockey*, 69 Penn. St. 71.

<sup>5</sup> *Fennell v. Ridler*, 5 B. & C. 406; *Simpson v. Nicholls*, 3 M. & W. 240; 5 M. & W. 704; *R. v. Cleworth*, 4 B. & S. 927. That at common law there is no such limitation, see *Drury v. Defontaine*, 1 Taunt. 131; *R. v. Brotherton*, Stra. 702; *Bloom v. Richards*, 2 Oh. St. 387; *Benj. on Sales*, 3d Am. ed. § 552.

<sup>6</sup> *State v. Gurney*, 37 Me. 149; *State v. Barker*, 18 Vt. 195; *Com. v. Harrison*, 11 Gray, 308; *Specht v. Com.*, 8 Penn. St. 312; *Schlict v. State*, 31 Ind. 346; *Foltz v. State*, 33 Ind. 215;

even on Jews, and persons conscientiously holding that Saturday is the true Sabbath, the statutes are obligatory.<sup>1</sup> In some states, however, it is provided that the statute shall not apply to persons conscientiously keeping the seventh day of the week as Sabbath, provided they do not disturb others. And in Ohio it has been held that, a statute prohibiting "trading" on Sunday is void as to persons conscientiously holding the seventh day as the Sabbath.<sup>2</sup>—The statutes vary in their terms. In some states the statute of 29 Car. II. as above given, is reproduced without material change. In other states every kind of secular labor on Sunday is forbidden, in others penalties are attached to secular labor without such labor being absolutely prohibited. As a general rule, however, all executory business transactions on Sunday, when prohibited by statute, have been held void.<sup>3</sup>—Hence,

Langabier v. Fairburg, 64 Ill. 243; State v. Anderson, 30 Ark. 131; State v. Amts, 20 Mo. 214; Bird *ex parte*, 19 Cal. 130.

<sup>1</sup> Com. v. Hyneman, 101 Mass. 30; Com. v. Has, 122 Mass. 40; Com. v. Wolf, 3 S. & R. 48; Specht v. Com., 8 Barr, 312; Philips v. Gratz, 2 Pen. & Watts, 412.

<sup>2</sup> Cincinnati v. Rice, 15 Ohio, 225.

<sup>3</sup> 2 Pars. on Cont. 764; Benj. on Sales, 3d Am. ed. § 556; Story on Cont. § 753; Bryant v. Biddeford, 39 Me. 193; Meader v. White, 66 Me. 90; Allen v. Deming, 14 N. H. 133; Varney v. French, 19 N. H. 233; George v. George, 47 N. H. 27; Smith v. Bean, 15 N. H. 577; Sumner v. Jones, 24 Vt. 317; McClary v. Lowell, 44 Vt. 116; Robeson v. French, 12 Met. 24 (modifying prior rulings); Pattee v. Greeley, 13 Met. 284; Dickinson v. Richmond, 97 Mass. 45; Cranson v. Goss, 107 Mass. 441; Feital v. R. R., 109 Mass. 398; Connolly v. Boston, 117 Mass. 64; Allen v. Gardiner, 7 R. I. 24; Cameron v. Peck, 37 Conn. 555; Cincinnati v. Rice, 15 Ohio, 225; Sellers v. Dugan, 18 Ohio, 489; Adams v.

Hamell, 2 Doug. (Mich.) 73; Reynolds v. Stevenson, 4 Ind. 619; Pike v. King, 16 Iowa, 50; Sayre v. Wheeler, 31 Iowa, 112; 32 Iowa, 559; Murphy v. Simpson, 14 B. Mon. 419; O'Donnell v. Sweeney, 5 Ala. 467; Saltmarsh v. Tuthill, 13 Ala. 390; Hussey v. Roquemore, 27 Ala. 281; Block v. McMurtry, 56 Miss. 217; Tucker v. West, 29 Ark. 386. Under the New York statute, while contracts for work on Sunday are void; Watts v. Van Ness, 1 Hill, 76; the clause prohibiting exposures to sale does not prohibit private transfers of property. Boynton v. Page, 13 Wend. 425; Eberle v. Mehrback, 55 N. Y. 682. The same distinction exists in Ohio, Bloom v. Richards, 2 Oh. St. 387; and in California, Moore v. Murdock, 26 Cal. 514. In New Hampshire by statute only acts done on Sunday to "the disturbance of others" are prohibited; but under this statute it has been held that a pleading to be good, must aver the litigated act was done to "the disturbance of others." And under "disturbance of others" is included whatever draws the attention of others from the appropriate duties

a bond made on Sunday has been held void;<sup>1</sup> this being the case with a replevin bond;<sup>2</sup> and so of notes made on Sunday.<sup>3</sup> It is true that to a *bona fide* innocent holder for a valuable consideration of a note executed on Sunday the statute cannot be set up;<sup>4</sup> but a suit cannot be maintained on an endorsement by an endorsee knowing the facts.<sup>5</sup> A suit, also, cannot be maintained on a contract made on Sunday to do professional business;<sup>6</sup> and so of loans made on Sunday;<sup>7</sup> and of promises

of the Sabbath. *Varney v. French*, 19 N. H. 233; *Clough v. Shepherd*, 31 N. H. 490. In *Rogers v. Tel. Co.*, S. Ct. Ind. Jan. 13, 1882, 25 A. L. J. 203, 14 Cent. L. J. 174, it was held that a contract on Sunday for the transmission of a telegraph message may be void. The message, to follow the report in the *Albany Law Journal* (vol. 25, 203), was, "Come up in morning, bring all." The court said: "No rule is more firmly settled than the one under mention, and we cannot now depart from it. Courts cannot declare, as a matter of law, that the business of telegraphy is a work of necessity. There are doubtless many cases in which the sending and delivering of a message would be a work of necessity, within the meaning of our statute. But we cannot judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case. We cannot adjudge that the message which the appellee agreed to transmit is one which comes within the statute permitting the performance of works of necessity. It reads thus: 'Come up in the morning, bring all.' These words are to be taken in their ordinary meaning, for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the

sender. Such a message cannot be regarded as a 'work of necessity,' within the meaning of the statute. The contract for the transmission of the message having been made on Sunday, and the message not being one which can be treated as entitling it to be transmitted as a 'work of necessity,' the contract for its transmission must be adjudged incapable of enforcement."

<sup>1</sup> *Pattee v. Greely*, 13 Met. 24. See generally *Lyon v. Strong*, 6 Vt. 216; *Day v. McAllister*, 15 Gray, 433; *Ellis v. Hammond*, 57 Ga. 179; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Hussey v. Roquemore*, 27 Ala. 281.

<sup>2</sup> *Link v. Clemmens*, 7 Blackf. 480.

<sup>3</sup> *Towle v. Larrabee*, 26 Me. 464; *Pope v. Linn*, 50 Me. 83; *Tillock v. Webb*, 56 Me. 100; *Adams v. Gay*, 19 Vt. 358; *Goss v. Whitney*, 27 Vt. 272; *Pattee v. Greely*, 13 Met. 284; *Cranston v. Goss*, 107 Mass. 440; *Kepner v. Keffer*, 6 Watts, 231; *Johnston v. Com.*, 22 Penn. St. 102; *Clough v. Goggins*, 40 Iowa, 325; *Rainey v. Capps*, 22 Ala. 288.

<sup>4</sup> See *infra*, § 386. That notes executed on Sunday are invalid, see further *Adams v. Hamell*, 2 Doug. (Mich.) 73; *Parker v. Pitts*, 73 Ind. 597; *Doolson v. Harris*, 10 Ala. 566; *Saltmarsh v. Tuthill*, 13 Ala. 390. As to distinction between "void" and "voidable," see *supra*, § 28.

<sup>5</sup> *Benson v. Drake*, 55 Me. 555.

<sup>6</sup> *Peate v. Dicken*, 1 C. M. & R. 422.

<sup>7</sup> *Finn v. Donahue*, 35 Conn. 216.

relied on to take debts out of the statute of limitations.<sup>1</sup> A valid contract, also, cannot be rescinded on Sunday,<sup>2</sup> and a guarantee executed and delivered on Sunday is void, though the document guaranteed is to be delivered on a subsequent secular day.<sup>3</sup> But when an agreement of sale was made on Sunday, the articles to be weighed and delivered on Monday, which was done, it was held that the vendor could recover for goods sold and delivered, though not on the contract.<sup>4</sup> And a bond or note made on a Sunday, though on its face void, may be used as the admission of an antecedent debt.<sup>5</sup>—The fact that preliminary bargaining was done on Sunday does not invalidate a contract completed on a subsequent secular day.<sup>6</sup> Hence, where a bargain for goods is made on Sunday, but is not completed until the next day, when the goods are delivered, the case is not within the statute;<sup>7</sup> though when the contract was actually made on Sunday, it is not taken out of the statute by preliminary bargainings on other days.<sup>8</sup> Nor is the case taken out of the statute by a mere postponement of the removal of goods sold till the next day, if the bargain was completed and delivery made on Sunday;<sup>9</sup> but a deed, bond, or note signed on a Sunday is valid, when delivered on the

<sup>1</sup> *Haydock v. Tracey*, 3 W. & S. 507; *Dennis v. Sherman*, 31 Ga. 607; but see *contra*, *Thomas v. Hunter*, 29 Md. 406.

<sup>2</sup> *Benedict v. Batchelder*, 24 Mich. 425.

<sup>3</sup> *Merriam v. Stearns*, 10 Cush. 257.

<sup>4</sup> *Bradley v. Rea*, 14 Allen, 20; *Rosenblatt v. Townsley*, 73 Mo. 536.

<sup>5</sup> *Haydock v. Tracy*, 3 W. & S. 507; *Lea v. Hopkins*, 7 Penn. St. 492; see *Stacy v. Kemp*, 92 Mass. 166.

<sup>6</sup> *Goss v. Nugent*, 5 B. & Ad. 58, and other cases cited Wh. on Ev. § 1014; *Stackpole v. Symonds*, 3 Fost. 229; *Goss v. Whitney*, 24 Vt. 187; *Stacy v. Kemp*, 97 Mass. 166; *Butler v. Lee*, 11 Ala. 885; *Bryant v. Booze*, 55 Ga. 438; *Peake v. Conlan*, 43 Iowa, 297.

<sup>7</sup> *Benj. on Sales*, § 557; *Smith v. Bean*, 15 N. H. 577; *Merrill v. Downs*,

41 N. H. 72; *Lyon v. Strong*, 6 Vt. 216; *Adams v. Gay*, 19 Vt. 358; *Lovejoy v. Whipple*, 18 Vt. 379; *Mason v. Thompson*, 18 Pick. 305; *Winchell v. Carey*, 115 Mass. 560; *Cameron v. Peck*, 37 Conn. 555; *Sayles v. Wellman*, 10 R. I. 465; *Hening v. Powell*, 33 Mo. 468; *Fritsch v. Heislen*, 40 Mo. 555; *Luebering v. Oberkoelter*, 1 Mo. App. 399; *Gwinn v. Simes*, 61 Mo. 335; *Rosenblatt v. Townsley*, 73 Mo. 536.

<sup>8</sup> *Tillock v. Webb*, 56 Me. 100; *Smith v. Foster*, 41 N. H. 215; *Winchell v. Carey*, 115 Mass. 560; *Sayles v. Wellman*, 10 R. I. 465. See *Plaisted v. Palmer*, 63 Me. 576; *Bradley v. Rea*, 14 Allen, 20; *Day v. McAllister*, 15 Gray, 433; *Bryant v. Booze*, 55 Ga. 438.

<sup>9</sup> *Allen v. Deming*, 14 N. H. 138; *Smith v. Bean*, 15 N. H. 577.

succeeding day.<sup>1</sup>—No action of deceit, or for damages for fraudulent representation, or action on a warranty, can be based on a Sunday sale or trade.<sup>2</sup>

§ 383. When a contract has been executed, neither party, as a general rule, can recover from the other what has been transferred, or in any way disturb the rights which have been acquired under the contract. The contract, in other words, cannot, after it has been executed, be overhauled on account of its solemnization on Sunday.<sup>3</sup> And when a debt has been paid on Sunday, the money cannot be recovered back.<sup>4</sup>

§ 384. It has been held in New Hampshire and Iowa that when goods are sold and delivered on Sunday, and there has been a subsequent refusal of the purchaser to pay, if the vendor seizes the property in the hands of the purchaser, the vendor will be compelled to restore it in an action of replevin;<sup>5</sup> and it has been held in

<sup>1</sup> *Hilton v. Houghton*, 35 Me. 143; *Clough v. Davis*, 9 N. H. 500; *Lovejoy v. Whipple*, 18 Vt. 379; *Hill v. Dunham*, 7 Gray, 543; *Com. v. Kendig*, 2 Barr, 448; *Sherman v. Roberts*, 1 Grant, 261; *Love v. Wells*, 25 Ind. 503; *Flanagan v. Meyer*, 41 Ala. 132; *Dohoney v. Dohoney*, 7 Bush, 217. But see *contra* as to note of surety, *Parker v. Pitts*, 25 Ind. 598.

<sup>2</sup> *Benj. on Sales*, 3d Am. ed. § 553; *Plaisted v. Palmer*, 63 Me. 676; *Smith v. Bean*, 15 N. H. 577; *Lyon v. Strong*, 6 Vt. 216; *Hulet v. Stratton*, 5 Cush. 539; *Robeson v. French*, 12 Met. 24; *Kinney v. McDermot*, 55 Iowa, 674; *Gunderson v. Richardson*, 56 Iowa, 56; *Finley v. Quirk*, 9 Minn. 194.

<sup>3</sup> *Supra*, §§ 352, 377; *Benj. on Sales*, 3d Am. ed. § 577; *Greene v. Godfrey*, 44 Me. 25; *Allen v. Deming*, 14 N. H. 133; *Smith v. Bean*, 15 N. H. 577; *Hall v. Costello*, 48 N. H. 176; *Myers v. Meinrath*, 101 Mass. 368; *Horton v. Buffington*, 105 Mass. 399; *Hall v. Corcoran*, 107 Mass. 259; *Finn v. Dona-*

*hue*, 35 Conn. 216; *Shuman v. Shuman*, 27 Penn. St. 90; *Foreman v. Ahl*, 55 Penn. St. 325; *Chesnut v. Harbaugh*, 75 Penn. St. 473; *Kinney v. McDermot*, 55 Iowa, 674; *Beauchamp v. Comfort*, 42 Miss. 94.

<sup>4</sup> *Supra*, §§ 352, 377; *Johnson v. Willis*, 7 Gray, 164. That there may be a recovery on a *quantum meruit* for services rendered under a contract made on a Sunday, see *Thomas v. Hatch*, 53 Wis. 296.

<sup>5</sup> In *Smith v. Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said: "The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle

Alabama and Arkansas that a vendee retaining goods after a Sunday purchase is liable in trover, after demand and refusal.<sup>1</sup>—The prevalent opinion is that the fact that goods sold and delivered, but not paid for, on Sunday are retained by the purchaser on Monday does not, without a fresh promise based on the detention, sustain an action by the vendor for the price of goods sold and delivered.<sup>2</sup> But a fresh promise, or even recognition of indebtedness, coupled with detention of goods, will support an assumpsit.<sup>3</sup> Hence, while the mere retention on Monday of goods obtained on Sunday involves no promise to pay for them, and while the vendor, without exposing himself to an action of replevin, cannot reclaim the property,<sup>4</sup> yet, if after demand the purchaser admits the vendor's ownership, but refuses to return, he may be made liable in trover; or an admission of the vendor's ownership, with a request to retain the goods, may be the basis of a fresh assumpsit. But no mere ratification of the Sunday sale as such will give it effect.<sup>5</sup>

shows that the law will not aid the vendor to recover possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession." *S. P. Kinney v. McDermott*, 55 Iowa, 674. To the same effect is 2 *Parsons*, 764; *Meador v. White*, 66 Me. 90. As to distinctive rule in New York and Ohio see *supra*, § 382.

<sup>1</sup> *Dodson v. Harris*, 10 Ala. 566; *Tucker v. West*, 29 Ark. 386. It has been held in Vermont that when goods are sold and are delivered on Sunday, the vendor may on the next day demand them, and in case their return is refused, this is regarded as a purchase on the prior terms. *Adams v. Gay*, 19 Vt. 358.

<sup>2</sup> *Simpson v. Nichols*, 3 M. & W. 240; 5 M. & W. 702, overruling *Williams v. Paul*, 6 Bing. 653; *Myers v. Meinrath*, 101 Mass. 366; *Cranson v. Goss*, 107 Mass. 441; *Ellis v. Hammond*, 57 Ga. 179; but see *contra*, *Allen v. Deming*, 14 N. H. 133; *Boutelle v. Melandy*, 19 N. H. 196; *Tucker v. West*, 29 Ark. 386.

<sup>3</sup> *Adams v. Gay*, 19 Vt. 358; *Sargeant v. Butts*, 21 Vt. 99; *Sumner v. Jones*, 24 Vt. 317. See *Harrison v. Colton*, 31 Iowa, 16; and see fully *Benj. on Sales*, 3d Am. ed. § 558, where these authorities are discussed.

<sup>4</sup> See *supra*, § 352.

<sup>5</sup> *Infra*, § 389, and see in addition to cases above cited, *Day v. McAllister*, 15 Gray, 433; *Bradley v. Rea*, 14 Allen, 20; 103 Mass. 188; *Finn v. Donahue*, 35 Conn. 216; *Reeves v. Butcher*, 2 Vroom, 224. In *Moseley v. Vanhoozer*, 6 Lea (Tenn.), 286, A. agreed to buy a yoke of oxen of B. The terms of the sale were agreed upon on Sunday, but A. was to see the condition of the oxen before he was absolutely bound. He

When statute relates to "ordinary" calling, it does not invalidate collateral contracts.

§ 385. The English statute, as has been seen, prohibits labor in the "ordinary calling" of the parties prohibited. Under this and cognate statutes isolated private contracts made by parties outside of their ordinary calling are not invalidated.<sup>1</sup> It was held in 1808 that a private sale of a horse on Sunday, when not in the seller's ordinary calling, he not being a tradesman of that class, is not void by the statute;<sup>2</sup> but this has now been virtually overruled.<sup>3</sup> And it has been further held that a contract of hiring made on a Sunday between a farmer and a laborer is not in conflict with the statute.<sup>4</sup> Proprietors of stage coaches, so far as concerns their contracts with passengers, are not within the terms of the act.<sup>5</sup>

saw them the next day, and being satisfied with them, removed them. It was held that the contract was not complete on Sunday, and if a contract made on Sunday is to be held void, it must be technically complete in that day.

<sup>1</sup> *George v. George*, 47 N. H. 27; *Hazard v. Day*, 14 Allen, 487; *Bloom v. Richards*, 2 Oh. St. 388.

<sup>2</sup> *Drury v. Defontaine*, 1 Taunt. 131. See *Bloxsome v. Williams*, 3 B. & C. 232.

<sup>3</sup> *Smith v. Sparrow*, 4 Bing. 86; *Fennell v. Ridler*, 5 B. & C. 406.

<sup>4</sup> *R. v. Whitnash*, 7 B. & C. 596.

<sup>5</sup> *Sandiman v. Breach*, 7 B. & C. 96.

Under the South Carolina statute, a mortgage which has been executed on a Sunday has been held to be valid. *Hellams v. Abercrombie*, 15 S. C. 110. In this case Simpson, C. J., said: "In *Shaw v. M'Combs*, 2 Bay, 232, this expression is used: 'Sunday is not a day in law—*dies dominicus et non dies juridicus*—consequently all temporal business transaction on that day is null and void.' But this was only an inference of the reporter not sustained by the facts. Under these cases it appears that there is nothing in the com-

mon law which renders this contract void. 2 Parsons on Contr. 757.

"Is the contract void by virtue of any statute of the state? The act of 1712 is the only act on the subject. That act forbids tradesmen, workmen, laborers, etc., from exercising any worldly labor, business, or work in their ordinary calling upon the Lord's day under a certain penalty.

"The execution of the mortgage now under consideration does not fall within the penalty of this act, and therefore void. It was not an act done within the ordinary calling of the parties. It was a casual and exceptional act, and in no way violated the act of 1712.

"The first section of 29 Car. II. was very similar in its terms to the act of 1712. This section was construed in the cases of *Drury v. Defontaine*, 1 Taunt. 131, and in *Bloxsome v. Williams*, 3 B. & C. 232, not to embrace contracts made outside of the ordinary calling of the party. True, in one case decided a different doctrine was held, the construction above being regarded as too narrow, and contrary to the spirit of the act; but in the subsequent decisions, especially in the case



§ 386. As against a *bona fide* endorsee the maker cannot set up as a defence that the note was made on Sunday.<sup>1</sup>

Endorsee without notice not bound.

§ 387. Where the statute only prohibits business in a party's ordinary calling, a party cannot set up the statute against strangers dealing with him *bona fide* in ignorance that he was at the time exercising his ordinary calling. The mistake made by parties so dealing with him is a mistake not of law but of fact, and, if not negligent, it should not preclude such other parties from recovery. It is otherwise, however, with the party himself. He is barred from recovery, notwithstanding the fact that the other party was ignorant of his disability.<sup>2</sup>

Parties dealing *bona fide* are protected.

§ 388. Several of the statutes except cases of "necessity" and "charity," or "mercy."—The term "necessity" is not restricted to cases in which the party is physically required to do the act in question. "Necessity," in the sense of the statute, means such an extremity as requires labor in order to avoid serious peril.<sup>3</sup> Hence, it has been held that a contract with a debtor is a necessity, when otherwise the debt would be lost;<sup>4</sup> and that repairing a road is a necessity when otherwise serious damage might ensue.<sup>5</sup> On the other hand, it is not a necessity to visit a house to be moved into the next day for the purpose of determining whether it is in good order;<sup>6</sup> nor is loading a steamboat with flour to avoid sudden closing of navigation;<sup>7</sup>

Exception to be liberally construed.

of *Rex v. Inhab. of Whitnash*, 7 B. & C. 596, the decision in the case of *Bloxsome v. Williams*, *supra*, was reaffirmed, and a contract of hiring between a farmer and a laborer for a year, made on Sunday, was held valid. Such, in our opinion, is the proper construction of the act of 1712, incorporated in the General Statutes, p. 390.

<sup>1</sup> *Supra*, § 382; *Bank of Cumberland v. Mayberry*, 48 Me. 198; *Allen v. Deming*, 14 N. H. 133; *State Bank v. Thompson*, 42 N. H. 369; *Cranson v. Goss*, 107 Mass. 439; *Johns v. Bailey*,

45 Iowa, 241; *Clinton v. Graves*, 48 Iowa, 228. See, to same effect, *Bloxsome v. Williams*, 3 B. & C. 232; *Begbie v. Levi*, 1 Cr. & J. 180; *Saltmarsh v. Tuthill*, 13 Ala. 390.

<sup>2</sup> *Supra*, § 385-6; *Bloxsome v. Williams*, 3 B. & C. 232; 5 S. & R. 82; *Fennell v. Ridler*, 5 B. & C. 406; *Smith v. Wilcox*, 19 Barb. 581.

<sup>3</sup> See *Stewart v. Davis*, 31 Ark. 518.

<sup>4</sup> *Hooper v. Edwards*, 18 Ala. 280.

<sup>5</sup> *Flagg v. Millbury*, 4 Cush. 243.

<sup>6</sup> *Smith v. R. R.*, 120 Mass. 490.

<sup>7</sup> *Pate v. Wright*, 30 Ind. 476.

nor is shaving by a barber.<sup>1</sup> For a son to visit a father is an act of mercy;<sup>2</sup> and so is visiting a sick friend or relative;<sup>3</sup> but not volunteering to assist a neighbor in cleaning out his wheel-pit.<sup>4</sup> A marriage may be validly solemnized on Sunday.<sup>5</sup> In Massachusetts and Pennsylvania, attendance at public worship is within the exception,<sup>6</sup> though in Maine, it seems to be otherwise.<sup>7</sup>—It has been ruled in Vermont, that honest belief in necessity is not enough to place a party within the exception. There must be actual necessity.<sup>8</sup>—A contract on the Lord's day by overseers of the poor for relief of a pauper, is not void;<sup>9</sup> nor is a subscription to a church.<sup>10</sup>

§ 389. It has been held in several jurisdictions, that a contract invalid from having been executed on Sunday cannot, after its completion, be ratified on a subsequent secular day, without some new consideration or modification giving it a fresh start.<sup>11</sup> But though there may be no ratification, a new contract on a secular day may be implied, as we have seen, from the recognition of

Sunday  
contracts  
cannot be  
ratified.

<sup>1</sup> *Phillips v. Innes*, 4 Cl. & F. 234.

<sup>2</sup> *Logan v. Mathews*, 6 Barr. 417; see *McClary v. Lowell*, 44 Vt. 116.

<sup>3</sup> *Gorman v. Lowell*, 117 Mass. 65; *Doyle v. R. R.*, 118 Mass. 195.

<sup>4</sup> *McGrath v. Merwin*, 112 Mass. 167; citing *Hall v. Corcoran*, 107 Mass. 251.

<sup>5</sup> *Gangwere's Est.*, 14 Penn. St. 417.

<sup>6</sup> *Feital v. R. R.*, 109 Mass. 398; *Com. v. Nesbit*, 34 Penn. St. 398.

<sup>7</sup> *Tillock v. Webb*, 56 Me. 100.

<sup>8</sup> *Johnson v. Irasburgh*, 47 Vt. 28; see as to "honest belief," Wh. Cr. L. 8th ed. § 88.

<sup>9</sup> *Aldrich v. Blackstone*, 128 Mass. 145.

<sup>10</sup> *Flagg v. Millburg*, 4 Cush. 243; *Bennett v. Brooks*, 9 Allen, 118; *Doyle v. R. R.*, 118 Mass. 195; *Allen v. Duffie*, 43 Mich. 1; *Dale v. Knapp*, 11 Weekly Notes, 12; see *contra*, *Catlett v. Trustees*, 62 Ind. 365.

<sup>11</sup> *Supra*, § 384; *Williams v. Paul*, 6

*Bing*. 653; *Pope v. Linn*, 50 Me. 83; *Meador v. White*, 66 Me. 90; *Sumner v. Jones*, 24 Vt. 317; *Day v. McAlister*, 15 Gray, 433; *Tuckerman v. Hinkley*, 9 Allen, 452; *Cranson v. Goss*, 107 Mass. 439; *contra*, *Simpson v. Nicholls*, 3 M. & W. 240; *Finn v. Donahue*, 35 Conn. 216; *Reeves v. Butcher*, 2 Vroom, 224; *Ryno v. Darby*, 20 N. J. Eq. 231; *Tucker v. West*, 29 Ark. 386; see *Story on Cont.* (Bigelow's note), § 756; *Adams v. Gay*, 19 Vt. 358; *Shippey v. Eastwood*, 9 Ala. 198. In *Van Hoven v. Irish*, U. S. Cir. Ct. Min. 1882, it was held that a sale invalid from being made on Sunday could be ratified on a week day, following, in this respect, *Adams v. Gay*, 19 Vt. 358; *Harrison v. Colton*, 31 Iowa, 16; in order, quoting from *Redfield, J.*, "to secure parties from fraud and overreaching practised on Sunday by those who know their contracts are void and cannot be enforced."

indebtedness on that day.<sup>1</sup> And it is difficult to reconcile the position that such contracts are absolutely null with the position that they bind innocent endorsees without notice.<sup>2</sup>

§ 390. A court will take judicial notice that a particular date was Sunday.<sup>3</sup> But when the statute prescribes that Sunday closes with sun-setting, there must be proof that the contract was in that part of the day in which it would have been illegal.<sup>4</sup> The date may be contradicted by parol, and it may be shown that though a writing is dated on a secular day, the real date is Sunday.<sup>5</sup>

Date may be corrected by parol.

§ 391. In several states the duration of Sunday, so far as concerns the limitation now before us, is defined by statute. In such states the statutory prescriptions are to control.<sup>6</sup>

Duration of Sunday determined by statute.

## VI. INTERFERENCE WITH FAMILY RELATIONS.

§ 394. Marriage being an institution which is superior to local law, all contracts to modify its character are void.—“Contracts are subordinated to the state, but the state is subordinated to marriage.” Hence no contracts by the parties to a marriage modifying its essential characteristics are valid.<sup>7</sup> This rule has been applied to agreements by which one party to divorce proceedings is bound to the other not to resist the process.<sup>8</sup> All agreements in consideration of divorce proceed-

Agreements modifying marriage are void, and so are agreements for divorce.

<sup>1</sup> *Supra*, §§ 382 *et seq.*

<sup>2</sup> *Supra*, § 386; and see observations, *supra*, § 28.

<sup>3</sup> Wh. on Ev. § 335; *Tutton v. Darke*, 5 H. & N. 649; *Hoyle v. Cornwallis*, 1 Str. 387; *Hanson v. Shackleton*, 4 Dowl. 48; *Sasscer v. Bank*, 4 Md. 409; *Clough v. Goggins*, 40 Iowa, 325; *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674; *Rodgers v. State*, 50 Ala. 102.

<sup>4</sup> *Nason v. Dinsmore*, 34 Me. 391; see *Hiller v. English*, 4 Strobb. 486.

<sup>5</sup> *R. v. Treharne*, 1 Mood. C. C. 298; *Com. v. Harrison*, 11 Gray, 308; and other cases cited Wh. Cr. Ev. § 106; *Heller v. Crawford*, 37 Ind. 279.

<sup>6</sup> *Nason v. Dinsmore*, 34 Me. 391; *Hilton v. Houghton*, 35 Me. 143; *Tracy v. Jenks*, 15 Pick. 465; *Hill v. Dunham*, 7 Gray, 543; *Cranson v. Goss*, 107 Mass. 443; *Fox v. Abel*, 2 Conn. 541.

<sup>7</sup> Wh. Con. of L. § 126.

<sup>8</sup> *Hope v. Hope*, 8 D. M. G. 731; *Sayles v. Sayles*, 1 Fost. 312; *Weeks v. Hill*, 38 N. H. 199; *Kilborn v. Field*, 78 Penn. St. 194; *Stoutenburg v. Lybrand*, 13 Oh. St. 228; *Hamilton v. Hamilton*, 89 Ill. 349; *Everhardt v. Puckett*, 73 Ind. 409; *Comstock v. Adams*, 23 Kan. 513.

ings are void for the same reason. Thus in a Missouri case in 1880, it appeared that during the pending of a divorce suit the parties agreed in writing that if a divorce was granted without alimony, certain securities were to be delivered to the wife's trustee, it was held that a suit could not be maintained on the contract.<sup>1</sup> Where, during pendency of divorce procedure by the wife, she entered into an agreement with her husband by which she was to join in conveying certain real estate of his to a third party, she releasing her dower, and he was to settle certain property on her absolutely, it was held that as the consideration of divorce was one of the ingredients of the agreement it could not be enforced.<sup>2</sup> When a divorce, also, is wrongfully obtained, an agreement by the parties not to disturb it will not be sustained.<sup>3</sup>

§ 395. Not only are agreements providing for future separation of husband and wife void,<sup>4</sup> but limitations of property on either husband or wife in the event of separation are held, in England, against the policy of the law.<sup>5</sup> But when there has been an actual separation between husband and wife, deeds of settlement between them and third persons, as trustees, will be sustained, such deeds providing for the wife's separate support, and for the husband's protection from the wife's indebtedness.<sup>6</sup> And in this country, as well as in England, deeds of settlement in such cases, where their object is immediate, and they are based on a separation which has actually taken place, are held valid where they contain no provisions contravening public policy.<sup>7</sup>

<sup>1</sup> *Speck v. Dansman*, 7 Mo. Ap. 165.

<sup>2</sup> *Hamilton v. Hamilton*, 89 Ill. 349.

<sup>3</sup> *Comstock v. Adams*, 23 Kan. 513.

<sup>4</sup> *Bispham's Eq.* § 115; *Hill on Trustees*, 668; *Perry on Trusts*, § 672; *Hindley v. Westmeath*, 6 B. & C. 200; *St. John v. St. John*, 11 Ves. 526; and cases cited *supra*, § 90.

<sup>5</sup> *Cartwright v. Cartwright*, 3 D. M. G. 982; *H. v. W.*, 3 K. & J. 382; cited *Leake*, 2d ed. 758.

<sup>6</sup> See cases cited, *supra*, § 90; *Jones v. Waite*, 5 Bing. N. C. 341; 4 M. & G. 1104; *Wilson v. Wilson*, 1 H. L. Ca.

538; 5 H. L. Ca. 40; *Gibbs v. Harding* L. R. 5 Ch. 336; *Charlesworth v. Holt*, L. R. 9 Ex. 38. That the covenants in such deeds will be enforced see *Sanders v. Rodway*, 16 Beav. 207; *Williams v. Bailey*, L. R. 2 Eq. 731; note to *Stapilton v. Stapilton*, 2 Lead. Cas. Eq. 853. In *Hunt v. Hunt*, 4 D. F. J. 221 *et seq.*, 10 W. R. 215, the subject is examined with great fulness by Lord Westbury.

<sup>7</sup> *Walker v. Walker*, 9 Wall. 743; *Barron v. Barron*, 24 Vt. 375; *Fox v. Davis*, 113 Mass. 255; *Beach v. Beach*,

Nor is the intervention of a trustee necessary,<sup>1</sup> though where a trustee is agreed upon by the parties, but refuses to act, and the trust never is carried into effect, the covenants will not be enforced.<sup>2</sup> A covenant not to sue for the restoration of conjugal rights will be sustained if inserted in such a deed, and will be enforced if the articles of separation have been otherwise executed.<sup>3</sup> But a deed for an immediate separation is void unless the separation actually take place.<sup>4</sup> And the reason is that while a separation which has taken place, or which is immediate, is regarded as a fact which justifies a proper settlement between the parties, to be guarded by proper covenants, marriage is an institution which is so far superior to local law as not to be susceptible of being modified in its conditions by contract.<sup>5</sup>

§ 396. The policy of the law being to encourage marriage, contracts imposing general restraints on marriage are void.<sup>6</sup> A covenant, therefore, to marry no one but the covenantee, without engaging to marry her, has been held inoperative;<sup>7</sup> and so of a covenant not to marry within a particular time;<sup>8</sup> and so of a bond by a

Contracts in general restraint of marriage void.

2 Hill, 260; *Griffin v. Banks*, 37 N. Y. 623; *Hutton v. Hutton*, 3 Barr, 100; *Dillinger's App.*, 35 Penn. St. 357; *Hitner's App.*, 54 Penn. St. 110; *Thomas v. Brown*, 10 Ohio St. 250; *Bettle v. Wilson*, 14 Oh. 257; *Dutton v. Dutton*, 30 Ind. 455; though see, as to refusing to execute deeds of separation, *Rogers v. Rogers*, 4 Paige, 518; *Champlin v. Champlin*, 1 Hoff. Ch. 55; *Simpson v. Simpson*, 4 Dana, 140; *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *Collins v. Collins*, Phill. (N. C.) Eq. 153; *Bisp. Eq.* § 115.

<sup>1</sup> *Barron v. Barron*, 24 Vt. 375; *Smith v. Knowles*, 2 Gr. 413; *Hutton v. Hutton*, 3 Barr, 100; *Garver v. Miller*, 16 Oh. St. 527; and see, to same effect, *Frampton v. Frampton*, 4 Beav. 294; though see, *contra*, *Carson v. Murray*, 3 Paige, 483; *Bettle v. Wilson*, 14 Ohio, 257; *Simpson v. Simpson*, 4 Dana, 140; *Watkins v. Watkins*, 7 Yerg. 283;

*Carter v. Carter*, 14 S. & M. 59; and cases cited *Wald's Pollock*, 270.

<sup>2</sup> *Smith v. Knowles*, 2 Grant, 413.

<sup>3</sup> *Sanders v. Rodway*, 16 Beav. 207; *Flower v. Flower*, 20 W. R. 231; *Wilson v. Wilson*, 1 H. L. Cas. 538.

<sup>4</sup> *Westmeath v. Salisbury*, 5 Bli. N. S. 339.

<sup>5</sup> See the cases given in *Wh. Con. of L.* § 126; and see also *H. v. W.*, 3 K. & J. 382; *People v. Mercein*, 8 Paige, 47; *Bindley v. Mulloney*, 7 Eq. 343.

<sup>6</sup> *Leake*, 2d ed. 757; *Morley v. Renoldson*, 2 Hare, 570; *Scott v. Tyler*, 2 Bro. C. C. 431; 2 Lead. Cas. Eq. 215; *Hartley v. Rice*, 10 East, 22; *Bellairs v. Bellairs*, L. R. 18 Eq. 510; *Jones v. Jones*, L. R. 1 Q. B. D. 279; *Williams v. Cowden*, 13 Mo. 211.

<sup>7</sup> *Lowe v. Peers*, 4 Burr. 2225; *Wilmot*, 371.

<sup>8</sup> *Hartley v. Rice*, 10 East, 22; see *Sterling v. Sinnickson*, 2 South. 756.

widow conditioned on her not marrying again.<sup>1</sup> But a settlement of real estate while the party remains single may be sustained when the intention is not to discourage marriage, but to give a proper support until marriage.<sup>2</sup>

§ 397. A limitation of property, however, to a man or a woman, in restraint of a second marriage, is not in itself void.<sup>3</sup> And restrictions against marrying particular persons have been sustained as not amounting to a general restraint on marriage.<sup>4</sup> So far as concerns deeds of realty, conditions in general restraint of marriage will be held valid, although there is no gift over, when the object is to make a provision until marriage. But as to personalty such a condition, if there is no gift over, will be held not to defeat the estate.<sup>5</sup> And in England such is now the case as to personalty, even when there is a gift over.<sup>6</sup> But a gift *durante viduitate*, with a limitation over, is valid, the object being to give support during widowhood.<sup>7</sup> Such limitations may be applied to widowers as well as to widows.<sup>8</sup> But a limitation during widowhood and life, without any bequest over, has been held to give an interest which a second marriage does not defeat.<sup>9</sup>—To adopt Judge Story's summary: "Conditions annexed to gifts, legacies, and devises, in restraint of marriage,

<sup>1</sup> Baker v. White, 2 Vern. 215.

<sup>2</sup> Jones v. Jones, L. R. 1 Q. B. D. 279; see Pollock, 3d ed. 325.

<sup>3</sup> Newton v. Marsden, 2 J. & H. 356; Allen v. Jackson, L. R. 1 C. D. 399; Jones v. Jones, L. R. 1 Q. B. D. 279, cited *supra*, § 396; Arthur v. Cole, 56 Md. 100.

<sup>4</sup> Leake, 2d ed. 758, citing Thurlow, C., Scott v. Tyler, 2 Bro. C. C. 431.

<sup>5</sup> Bisph. Eq. § 227; Hill on Trustees, 496; Story, Eq. Jur. §§ 274 *et seq.*; Harvey v. Asten, 1 Atk. 370; Jones v. Jones, L. R. 1 Q. B. D. 279; Phillips v. Medbury, 7 Conn. 568; McIlvaine v. Gethen, 3 Whart. 575; Hoopes v. Dundas, 10 Penn. St. 75; Com. v. Stauffer, 10 Penn. St. 350; Bennett v. Robinson, 10 Watts, 348; Hotz's Est., 38 Penn.

St. 422; Fox's Est., 1 Leg. Gaz. (Phil.)

53; Waters v. Tazewell, 9 Md. 291; Holmes v. Field, 12 Ill. 424; Collier v. Slaughter, 20 Ala. 263; though see Gough v. Manning, 26 Md. 347.

<sup>6</sup> Bellairs v. Bellairs, L. R. 18 Eq. 510.

<sup>7</sup> Bisph. Eq. § 227; Allen v. Jackson, L. R. 1 Ch. D. 399; Newton v. Marsden, 2 Johns. & H. 367; McIlvaine v. Githen, 3 Whart. 575; Bennett v. Robinson, 10 Watts, 348; McCullough's App., 12 Penn. St. 197; Vance v. Campbell, 1 Dana, 229; Pringle v. Dunkley, 14 Sm. & M. 16; Hughes v. Boyd, 2 Sneed, 512.

<sup>8</sup> Allen v. Jackson, L. R. 1 C. D. 399.

<sup>9</sup> Parsons v. Winslow, 6 Mass. 169.

are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void. And so if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature or so tied up to peculiar circumstances, that the party upon whom it is to operate is unreasonably restrained in the choice of marriage, it will fall under the like consideration. . . . But the same principles of public policy which annul such conditions, when they tend to a general restraint of marriage, will confirm and support them when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead. If parents, who must naturally feel the deepest solicitude for the welfare of their children and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those with whom they are associated by ties of kindred or friendship, could not, by imposing some restraints upon their bounty, guard the inexperience and ardor of youth against the wiles and delusions of the crafty and the corrupt, who should seek to betray them from motives of the grossest selfishness, the law would be lamentably defective, and would, under the pretence of upholding the institution of marriage, subvert its highest purposes. . . . Such a reproach does not belong to the common law in our day; and, least of all, can it be justly attributed to courts of equity."<sup>1</sup> A distinction, however, has been taken, as to limitations in special as well as to those in general restraint, between limitations of real and limitations of personal estate. When the limitation is as to real estate, it must be strictly complied with, supposing the condition to be good. But limitations of personal estate are not binding unless there is limitation over in case of default.<sup>2</sup>

<sup>1</sup> 1 Story, Eq. Jur. 12th ed. § 281. Hoopes v. Dundas, 10 Penn. St. 75; but

<sup>2</sup> 1 Story, Eq. Jur. 12th ed. § 289; see Otis v. Prince, 10 Gray, 581.

§ 398. It has also been held that all agreements to bring about marriages for a money consideration are void. The reason given is, that parties in a matter so important and so essential to the state as marriage should not be exposed to the machinations of speculators.<sup>1</sup> Even a bond given by a party after marriage in consideration of assistance rendered by the obligee in effecting the obligor's marriage, has been held void.<sup>2</sup>

§ 399. Not only is a fraudulent settlement by a woman, on eve of marriage, of property of which he is cognizant, and which he might therefore be supposed to marry on the faith of, void as against the husband,<sup>3</sup> but he is also held entitled to avoid settlements made by her in fraud of his marital rights of property of which he has no knowledge.<sup>4</sup> Nor will an ante-nuptial contract by the woman, without a fair disclosure of her husband's circumstances, be enforced against her.<sup>5</sup> A fraudulent conveyance, also, by a man in prospect of marriage, in such a way as to deprive the wife, if successful, of dower, will be void against her.<sup>6</sup>

<sup>1</sup> 1 Story Eq. Jur. § 263; 1 Fonbl. Eq. B. 1; Keat v. Allen, 2 Vern. 588; Hylton v. Hylton, 2 Ves. 548; Law v. Law, 3 P. Wms. 394; Boynton v. Hubbard, 7 Mass. 118.

<sup>2</sup> Williamson v. Gihon, 2 Sch. & L. 357.

<sup>3</sup> *Supra*, § 266; Bispham's Eq. § 253; England v. Downs, 2 Beav. 522; Goddard v. Snow, 1 Russ. Ch. 485; Williams v. Carle, 2 Stockt. Ch. 543; Waller v. Armistead, 2 Leigh, 11; Manes v. Durant, 2 Rich. Eq. 404; McAfee v. Ferguson, 9 B. Mon. 475.

<sup>4</sup> Goddard v. Snow, 1 Russ. Ch. 485; Chambers v. Crabbe, 34 Beav. 457; Taylor v. Pugh, 1 Hare, 608; Linker v. Smith, 4 Wash. C. C. 224; Tucker v. Andrews, 13 Me. 124; Terry v. Hopkins, 1 Hill Ch. 1; Williams v. Carle, 2 Stockt. 543; Duncan's App., 43 Penn. St. 67; Robinson v. Buck, 71 Penn. St. 386; S. C., 8 Phil. 87; Belt v. Ferguson, 3 Grant, 289; Greenawalt *ex*

*parte*, 2 Clark, 1; Logan v. Simmons, 3 Ired. Eq. 487; Baker v. Jordan, 73 N. C. 145; Jordan v. Black, Meigs, Tenn. 142; Freeman v. Hartman, 45 Ill. 57.

<sup>5</sup> Kline v. Kline, 57 Penn. St. 120; Kline's Est., 64 Penn. St. 122; cited *supra*, § 161.

<sup>6</sup> 2 Bishop, Married Wom. § 343; Wald's Pollock, 289, where the cases are cited; Schouler on Dom. Rel. 271; Bisp. Eq. § 499; Gibson v. Hutchinson, 120 Mass. 27; Swaine v. Perrine, 5 Johns. Ch. 482; Pierce v. Pierce, 71 N. Y. 154; Petty v. Petty, 4 B. Mon. 215; Leach v. Duvall, 8 Bush, 201; Gainor v. Gainor, 26 Iowa, 337; Crawson v. Crawson, 4 Mich. 230; Brown v. Bronson, 35 Mich. 415; Littleton v. Littleton, 1 Dev. & B. 327; Tate v. Tate, 1 Dev. & B. Eq. 22; Davis v. Davis, 5 Mo. 183; Butler v. Butler, 21 Kan. 521; Hamilton v. Smith, S. C. Iowa, 1881. See Killinger v. Reidenhauer, 6 S. & R. 532.



The question of fraud is to be determined from all the circumstances of the case;<sup>1</sup> secrecy not necessarily implying fraud.<sup>2</sup>—The wife, after her husband's death, may elect, if the conveyance be fraudulent, to set it aside; and a court of equity can be invoked for this purpose.<sup>3</sup> Whether such conveyance was made with intention to defraud the intended wife is to be determined from all the circumstances of the case.<sup>4</sup> The burden is on the party setting up the fraud.<sup>5</sup> A strong inference of fraud is to be drawn from the fact that there is a secret reservation for the husband's benefit.<sup>6</sup>

§ 400. The right of a father, also, to the custody of his children, is inalienable, and he is not bound by an agreement surrendering such custody, unless, from their extreme infancy, or his incompetency, the agreement is one the courts feel called upon to enforce.<sup>7</sup> "He cannot, therefore, by any contract, relieve himself from the responsibility of discharging this duty; and hence it must be considered as settled (at all events in England), that contracts by a father to give up to his wife the custody and education of their children, are contrary to public policy, and will not be enforced in equity against the husband; and this although the husband may have been guilty of adul-

Father cannot divest himself of custody of children.

<sup>1</sup> *Strathmore v. Bowes*, 1 Ves. Jr. 28.

<sup>2</sup> *Taylor v. Pugh*, 1 Hare, 613. In 2 Kent's Com. 175, it is said: "If the settlement be upon the children of a former husband, the settlement would be valid without notice," citing *King v. Colton*, 2 P. Wms. 674; *Jones v. Cole*, 2 Bailey, 330. And see *supra*, § 266.

<sup>3</sup> See *Jiggitts v. Jiggitts*, 40 Miss. 718; *Davis v. Davis*, 5 Mo. 183. The right is secured in some states by statute. *Littleton v. Littleton*, 1 Dev. & B. 327; *M'Intosh v. Ladd*, 1 Humph. 459; *Jiggitts v. Jiggitts*, 40 Miss. 718.

<sup>4</sup> *Supra*, § 239.

<sup>5</sup> *Gibson v. Hutchinson*, 120 Mass. 27; *Baker v. Chase*, 6 Hill (N. Y.) 482; *Crawson v. Crawson*, 4 Mich. 230; *Tate v. Tate*, 1 Dev. & B. Eq. 27; *Davis*

*v. Davis*, 5 Mo. 183. See on this topic an article by Judge Thompson in 14 Cent. L. J. 399.

<sup>6</sup> *Littleton v. Littleton*, 1 Dev. & B. 327; *Tucker v. Tucker*, 29 Mo. 350; 32 Mo. 464.

<sup>7</sup> *Bispham's Eq.* § 547; 2 Lead. Cas. Eq. 671; *Andrews in re*, L. R. 8 Q. B. 153; *Besant in re*, L. R. 11 Ch. D. 508; *Vansittart v. Vansittart*, 2 De G. & J. 249; *Farnsworth v. Richardson*, 35 Me. 267; *Richardson v. Richardson*, 35 Me. 560; *Johnson v. Terry*, 34 Conn. 259; *Torrington v. Norwich*, 21 Conn. 543; *Mercein v. People*, 25 Wend. 64; *People v. Mercein*, 3 Hill, 399; *State v. Baird*, 6 C. E. Green, 384; *Com. v. Smith*, 1 Brewst. 547; *Gates v. Renfro*, 7 La. An. 569; *Byrne v. Love*, 14 Tex. 81.

tery and of cruelty to his wife."<sup>1</sup> But the father may, by waiver, strengthened by lapse of time, preclude himself from asserting his right against the child's interests.<sup>2</sup> And a father, after consenting to a son taking employment, cannot, after the wages have been earned, retract such consent.<sup>3</sup> But, as a general rule, "the husband can in no circumstances bind himself not to set up his paternal rights,"<sup>4</sup> nor will such an agreement be operative unless in cases in which the father would on other grounds be deprived of his children's custody.<sup>5</sup>

## VII. INJURY TO PUBLIC SERVICE.

§ 402. An agreement to solicit legislative action by the use of private personal influence on members individually is void as against the policy of the law.<sup>6</sup> *A fortiori*, a promise made to a member of a legislature in consideration of his voting in a particular way is void.<sup>7</sup> But an agreement between a land-

Agreement privately to influence legislature is invalid.

owner and the promoter of a railroad that the land-owner, whose land is affected by a proposed railroad, will withdraw his opposition on the payment of a sum of money, has been

<sup>1</sup> Bisp. Eq. 3d ed. § 547. See Wh. & Tu. Lead. Cas. in Eq. 4th Am. ed. 1435, 1508-10; citing Hope v. Hope, 8 D. M. & G. 731; Vansittart v. Vansittart, 4 K. & J. 62; 2 De G. & J. 249.

<sup>2</sup> Curtis v. Curtis, 5 Gray, 535; Van Artsdalen v. Van Artsdalen, 14 Penn. St. 384; Com. v. Gilkeson, 1 Phila. 194; 5 Clark, 30; Com. v. Dougherty, 1 Leg. Gaz. (Phil.) 63; Mercein v. People, 25 Wend. 64; State v. Smith, 6 Greenl. 462 (a case going to the extreme limit).

<sup>3</sup> Torrens v. Campbell, 74 Penn. St. 470.

<sup>4</sup> Wald's Pollock, 304, citing Swift v. Swift, 34 Beav. 266; Hamilton v. Hector, 6 Ch. 705; 13 Eq. 520.

<sup>5</sup> Bispham's Eq. § 547. By act 36 Vict. c. 12, such agreements are, under certain conditions, validated.

<sup>6</sup> Story's Eq. Jur. 12th ed. § 293 b;

Edwards v. R. R., 1 My. & C. 650; Marshall v. R. R., 16 How. 314; McGuire v. Corwine, 101 U. S. 108; Usher v. McBratney, 3 Dill. 385; Powers v. Skinner, 34 Vt. 274; Pingry v. Washburn, 1 Aik. 264; Frost v. Belmont, 6 Allen, 152; Mills v. Mills, 40 N. Y. 543; Harris v. Roof, 10 Barb. 489; Rose v. Truax, 21 Barb. 361; Smith v. Applegate, 3 Zab. 352; Hatzfield v. Gulden, 7 Watts, 152; Clippenger v. Hepbaugh, 5 W. & S. 315; Martin v. R. R., 3 Phila. 316; Wood v. McCann, 6 Dana, 366; McBratney v. Chandler, 22 Kan. 692; Cummings v. Saux, 30 La. An. Part I. 207.

<sup>7</sup> Leake, 2d ed. 725. Per cur. Howden v. Simpson, 10 Ad. & El. 821. To same general effect, see Fuller v. Dame, 18 Pick. 472; Harris v. Roof, 10 Barb. 489; Bell v. Quinn, 2 Sandf. 146; Gulick v. Ward, 5 Halst. 87.

held in England not to be invalidated by the fact that the land-owner is a member of the legislature, his vote not being part of the consideration.<sup>1</sup>—In this country it is settled that agreements by which parties are to be allowed contingent fees for procuring specific legislation are void as against public policy; and on this ground it has been held by the Supreme Court of the United States that a plaintiff was not entitled to recover on an agreement by which he was to be paid for his services as agent in procuring certain legislation conditionally on his efforts being successful.<sup>2</sup> “Bribes,” said Grier, J.,<sup>3</sup> “in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are ‘proper means;’ and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or ‘careless’ members in favor of the bill.”<sup>4</sup> This, however, is

<sup>1</sup> *Howden v. Simpson*, 10 A. & E. 821. *Howden v. Simpson*, if it is to be regarded as sustaining an agreement by a member of a legislature to give up for money his opposition to a bill, not only would be held bad law in this country, but the parties to such an agreement would be held indictable for bribery. See *Wh. Cr. L.* 8th ed. § 1858. The ruling is excused by Mr. Pollock on the ground (certainly peculiar to England) that “in practice there is little chance of a conflict between duty and interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course,” he adds, “it would be improper for a member personally interested to sit on such a committee.” There can be no objection, it is true, to a member of the legislature making business arrangements as to matters to come before the legislature, provided

that such arrangements do not touch his political action. A member of congress who is a stockholder in a national bank, is not precluded from selling his stock from the fact that such banks are under control of congress. But a bargain made by him involving in any way his action as a member of congress is not only void as a contract, but is an indictable conspiracy. As to the point in *Howden v. Simpson*, that a party to a road procedure may make a valid contract as to his course in the litigation, see *Weeks v. Lippencott*, 42 Penn. St. 474; *Young v. Burtman*, 1 Phil. 203; *Smith v. Applegate*, 3 Zab. 352.

<sup>2</sup> *Marshall v. R. R.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; see *Rose v. Truax*, 21 Barb. 361.

<sup>3</sup> 16 How. 335.

<sup>4</sup> See, also, *Fuller v. Dame*, 18 Pick. 472; *Frost v. Belmont*, 7 Allen, 152; *Bryan v. Reynolds*, 5 Wis. 200; *Wood v. McCann*, 6 Dana, 366.

not to be considered as conflicting with the "right of the citizen to appear before the legislature or any other public body in person, or by a paid agent or attorney, for the purpose of asserting his just claims or urging the adoption of any measure of public or private utility."<sup>1</sup> Hence the rule before us does not preclude a valid agreement being made for professional services before a legislature.<sup>2</sup> But when the object

<sup>1</sup> Smith's L. C. 7th Am. ed. 692, citing *Sedgwick v. Stanton*, 4 Kern. 289; *Willey v. Collier*, 7 Md. 273; *Winpenny v. French*, 18 Ohio St. 469; *Bryan v. Reynolds*, 5 Wis. 200; *Wood v. McCann*, 6 Dana, 366; *Denison v. Crawford Co.*, 48 Iowa, 211.

<sup>2</sup> *Willey v. Collier*, 7 Md. 273; *Winpenny v. French*, 18 Oh. St. 469.

The distinction is thus stated by Field, J., in *Oscanyan v. Arms Co.*, 103 U. S. 261: "In *Trist v. Child*, reported in 21st of Wallace, the distinction is drawn between the use of personal influence to secure legislation and legitimate professional services in making the legislature acquainted with the merits of the measures desired. Whilst the former is condemned, the latter are, within certain limits, regarded as appropriate subjects for compensation. There the defendant had employed the plaintiff to get a bill passed by congress for an appropriation to pay a claim against the United States. It was considered by the court to have been a contract for lobby services, and adjudged void as against public policy. Other similar cases were mentioned by the court, and, after observing that in all of them the contract was held to be against public policy and void, it added, speaking through Mr. Justice Swayne: 'We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included

drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case.' " See *supra*, § 370.

In *Meguire v. Corwine*, 101 U. S. 111, *Trist v. Child* was reaffirmed. See to same general effect, *Powers v. Skinner*, 34 Vt. 274; *Mills v. Mills*, 40 N. Y. 543; *Bryan v. Reynolds*, 5 Wis. 200; *Gil v. Williams*, 12 La. An. 219. In *Marshall v. R. R.*, 16 How. 336, "log rolling" was held indictable. See, also, as to corrupt legislative combinations, opinion of Judge Curtis, Wh. Cr. L. 8th ed. § 1375.

It must be remembered, however, that compromise is the basis of all legislation in parliamentary government, and that to declare that all combinations in which there are mutual concessions are illegal is to affix the stamp of illegality on many beneficent legislative acts. This was strikingly illustrated in the proceedings which gave the English crown to William of

is to affect legislation by any other means than open argument, then a contract to promote such object will not be sustained. Even an agreement by which signatures to a petition are obtained by promise of money has been held invalid;<sup>1</sup> and so of an agreement to grant to individuals the right of passing a gate free from toll on condition of their withdrawing their opposition to a bill before the legislature.<sup>2</sup>

§ 403. An agreement by which a party, for a contingent fee, agrees to influence government to grant a contract for purchase of supplies, will not be enforced by the courts.<sup>3</sup> "Considerations," it was said, "as to the most efficient and economical mode of meeting the public wants should alone control in this respect the action of every department of government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds. . . . All agreements for

And so of agreement to corruptly influence executive.

Orange, and which, as Macaulay vividly shows, were a compromise between two parties, disagreeing in their general conceptions of government, and agreeing only in the conclusion that James II. had abdicated the throne. —In our early congressional history we have an analogous compromise recorded. In Jefferson's *Ana* (Jeff. Works, ix. 93, see Irving's *Life of Washington*, v. 70), we have detailed the compromise by which, after the funding bill was defeated by southern votes, its reconsideration was carried and its passage insured by a bargain by which the northern members agreed to place the seat of government on the Potomac in consideration of enough

votes to carry the funding bill. Mr. Clay's compromise and "omnibus" bills were made up in the same way. Members from one section agreed to vote for what was distasteful to them in consideration of aid from another section in carrying a measure in which they were particularly interested. See as to barter of offices, *infra*, § 407.

<sup>1</sup> Maguire v. Smock, 42 Ind. 1.

<sup>2</sup> Pingry v. Washburn, 1 Aik. 264.

That a contract fraudulently concocted between an engineer employed by a local board and a contractor is void, see *Wakefield Banking Co. v. Norman-ton Local Board*, 44 L. T. N. S. 697, cited *supra*, § 279.

<sup>3</sup> Tool Co. v. Norris, 2 Wall. 45.

pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointment to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country."<sup>1</sup> And this rule applies to contracts to corruptly influence officers of foreign governments.<sup>2</sup> A contract, also, to procure an appointment to a public office by private influence is invalid;<sup>3</sup> and so of a contract to obtain, for a contingent fee, the discharge of a drafted soldier;<sup>4</sup> and of a contract to obtain from the executive the appointment of C., the promisor, as special counsel, in consideration of the promisor dividing his fee with the promisee.<sup>5</sup> But it is otherwise as to professional services in procuring a pension or similar executive action.<sup>6</sup> The distinction in these cases is the same as that already taken in reference to applications to the legislature. If the object of a contract is to lay a matter properly before an executive, there is not only no reason why it should be invalidated, but many reasons why it should be sustained. So far from corruption being stimulated by agents of eminence ap-

<sup>1</sup> See *Hatzfield v. Gulden*, 7 Watts, 152; *Ashburner v. Parrish*, 81 Penn. St. 52; *O'Hara v. Carpenter*, 23 Mich. 410; *Pickett v. School Dist.*, 25 Wis. 551; *Mills v. Mills*, 40 N. Y. 543; *Kelly v. Devlin*, 58 How. N. Y. Pr. 487; *Hutchen v. Gibson*, 1 Bush, 270.

<sup>2</sup> *Hope v. Hope*, 8 D. G. M. & G. 731; *Watson v. Murray*, 8 C. E. Green, 257. In *Oscanyan v. Arms Co.*, 15 Blatch. C. C. 79, aff. S. C. U. S. 1881, 103 U. S. 261, an agreement was made by a manufacturer of rifles with the Turkish Consul General at New York that in case such consul should influence an agent of the Turkish government employed to purchase arms to purchase rifles of such manufacturer, the consul

would receive a commission upon the purchase. It was held that the contract was illegal and would not be enforced in the United States, even though it would have been legal in Turkey. See opinion, *supra*, § 402, and see *Cook v. Shipman*, 51 Ill. 316.

<sup>3</sup> *Davison v. Seymour*, 1 Bosw. 88; *Hager v. Catlin*, 18 Hun, 448; *Filson v. Himes*, 5 Barr, 452; *infra*, § 407. See *Weld v. Lancaster*, 56 Me. 453, where a sale of a government contract was held invalid.

<sup>4</sup> *Bowman v. Coffroth*, 59 Penn. St. 19.

<sup>5</sup> *Maguire v. Corwine*, 101 U. S. 101.

<sup>6</sup> *Painter v. Drum*, 40 Penn. St. 467; *Formby v. Pryor*, 15 Ga. 258.

pearing to represent private interests before the executive, such agencies, publicly acknowledged, and acting openly, are important instruments in preventing corruption. Hence contracts for services in applications for contracts, when honest and fair, will be sustained.<sup>1</sup>—Under this head may be noticed a celebrated English ruling to the effect that a limitation in the will of the seventh Earl of Bridgewater that if his devisee should not acquire the title of Marquis or Duke of Bridgewater, or should accept any inferior title, the estates should go over. The judges, eight against two, sustained the limitation, but this was reversed in the house of lords by four to one, Lords Lyndhurst, Brougham, Truro, and St. Leonards holding that such a limitation was against the policy of the law as putting an undue pressure on government, from which the appointments to peerages proceed. Lord Cranworth dissented, holding the limitation good.<sup>2</sup>

§ 404. When there is a board of pardons before whom counsel appear, or when there is a hearing before an executive, there is no reason why counsel should not present a case for consideration, and be properly paid for their services.<sup>3</sup> On the other hand, a contract whose consideration is the obtaining a pardon from a governor cannot be enforced.<sup>4</sup> It is otherwise with a contract for professional services in presenting and arguing a case before the executive.<sup>5</sup>

Professional services as to pardons permissible.

§ 405. While an agreement with a sheriff or other public officer of the same class to indemnify him in a service of writs for the purpose of determining questions of title will be sustained,<sup>6</sup> it is otherwise when

Agreements to influence public officers void.

<sup>1</sup> See *Lyon v. Mitchell*, 36 N. Y. 235.

<sup>2</sup> See criticism in Pollock, 3d ed. 289, 291 *et seq.*; *Egerton v. Earl Brownlow*, 4 H. L. C. 1-250.

<sup>3</sup> See *Bird v. Meadows*, 25 Ga. 251.

<sup>4</sup> *Hatzfield v. Gulden*, 7 Watts, 152; *Filson v. Himes*, 5 Barr, 492; *Bowman v. Coffrath*, 59 Penn. St. 23; *Haines v. Lewis*, 54 Iowa, 301.

<sup>5</sup> *Chadwick v. Knox*, 11 Foster, N. H. 226, and other cases cited Wald's

Pollock, 286. That a contract by the mayor of a city to lease a public park, and for an annual sum to keep it in repair, is void, see *Macon v. Huff*, 60 Ga. 221.

<sup>6</sup> See *Grett v. Close*, 16 East, 293; *Clark v. Foxcroft*, 6 Greenl. 296; *Connelly v. Walker*, 45 Penn. St. 449; *March v. Gold*, 2 Pick. 285; *Foster v. Clark*, 19 Pick. 329; *Com. v. Vandyke*, 57 Penn. St. 34.

the object is to induce him to do an illegal act, or to neglect his duty. Such agreements constitute indictable offences, and are in themselves void;<sup>1</sup> and so of bonds which an officer takes of a prisoner in consideration of an illegal indulgence amounting to an escape;<sup>2</sup> and of agreements to pay officers commissioned to take testimony for prematurely divulging the testimony;<sup>3</sup> and of agreements to pay public officers for doing their duty.<sup>4</sup> A note, however, accepted by an officer from a person charged with a revenue offence to save his property from attachment is not based on an invalid consideration.<sup>5</sup> And, as has already been incidentally seen, bonds given to a public officer to indemnify him for an illegal act may be enforced when the bonds did not operate as inducements to violate the law, and were not illegal in their inception, but were *bona fide* meant to remunerate him for expenses incurred by him in a mistaken view of duty. The seal in such cases makes it unnecessary to prove consideration.<sup>6</sup> An indemnity to a private person may, under the same circumstances, be sustained.<sup>7</sup>

And so of  
agreement  
to bribe  
voters.

§ 406. Independent of local statutes an agreement corruptly to influence votes at a popular election is invalid. Hence it has been held that a promise that a voter should be remunerated for time lost by

<sup>1</sup> *Hodsdon v. Wilkins*, 7 Greenl. 113; *Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, 5 Mass. 541; *Doty v. Wilson*, 14 Johns. 381; *Webber v. Blunt*, 19 Wend. 188; *Devlin v. Brady*, 36 N. Y. 531; *Richardson v. Crandall*, 48 N. Y. 328; *Satterlee v. Jones*, 3 Duer, 102; *Fanshot v. Stout*, 1 South. 319; *Newsom v. Thighen*, 30 Miss. 44. In *Ray v. Mackin*, 100 Ill. 246, an agreement between contractors to make collusive bids and pool profits was held void, see *infra*, § 443.

<sup>2</sup> *Wh. Cr. L.* 8th ed. § 1667; *Colby v. Sampson*, 5 Mass. 310; *Churchill v. Perkins*, 5 Mass. 541; *Fanshot v. Stout*, 1 South. 319; *Green v. Hern*, 2 Pen. & W. 167; *Hopkinson v. Leeds*, 78 Penn.

St. 396; *Kenworthy v. Stringer*, 27 Ind. 498.

<sup>3</sup> *Cooth v. Jackson*, 6 Ves. 12.

<sup>4</sup> *Infra*, § 502; *Gallagher v. Hallett*, 1 Caines, 104; *Gilmore v. Lewis*, 12 Ohio, 281; *Odineal v. Barry*, 24 Miss. 9.

<sup>5</sup> *Pilkington v. Green*, 2 B. & P. 151. See *Stonington v. Powers*, 37 Conn. 439.

<sup>6</sup> *Story Cont.* (Bigelow's ed.), § 707; *Drake on Attach.* § 1-9; *Hall v. Huntoon*, 17 Vt. 244; *Marsh v. Gold*, 2 Pick. 285; *Avery v. Halsey*, 14 Pick. 174; *Coventry v. Barton*, 17 Johns. 142; *McCartney v. Shepard*, 21 Mo. 573;

<sup>7</sup> *Stone v. Hooker*, 9 Cow. 154.



him in attending the polls cannot be enforced;<sup>1</sup> and so of a promise to pay him for money spent by him in travelling.<sup>2</sup> An agreement to pay money in consideration of abandoning an election petition has also been held invalid.<sup>3</sup> And it has been held that a promise to aid in the election of another cannot be made the subject of a suit.<sup>4</sup> Nor can a promise to pay for treating a candidate's supporters.<sup>5</sup>

§ 407. Agreements to pay money to secure public honors,<sup>6</sup> or public office, have been held void at common law;<sup>7</sup> and so of a sale by a person of his influence to obtain an office for another;<sup>8</sup> and a contract to resign for a certain payment.<sup>9</sup> As we have already seen, a contract for obtaining by private means the appointment to a public office, is invalid.<sup>10</sup> It has been held, also, that a corrupt agreement by two justices, in whom were vested certain county nominations, that A. will vote for B. if C. will vote for D., is a conspiracy at common law.<sup>11</sup> And so, it is argued by Judge Curtis, is a similar combination between members of the legislature.<sup>12</sup> Without accepting the position that such

So for sale  
of public  
offices.

<sup>1</sup> *Simpson v. Yeend*, L. R. 4 Q. B. 626.

<sup>2</sup> *Cooper v. Slade*, 6 E. & B. 447.

<sup>3</sup> *Coppock v. Bower*, 4 M. & W. 361.

<sup>4</sup> *Nichols v. Mudgett*, 32 Vt. 546. See *Martin v. Wade*, 37 Cal. 168; *O'Rear v. Kiger*, 10 Leigh, 622.

<sup>5</sup> *Duke v. Asbee*, 11 Ired. 112.

<sup>6</sup> *Kingston v. Pierrepont*, 1 Vern. 5.

<sup>7</sup> *Blachford v. Preston*, 8 T. R. 89; *Card v. Hope*, 2 B. & C. 661; *Richardson v. Mellish*, 2 Bing. 236; *Thomson v. Thomson*, 7 Ves. 470; *Waldo v. Martin*, 4 B. & C. 319; *Hanington v. Du Chatel*, 1 Bro. C. C. 124; *Carleton v. Whitcher*, 5 N. H. 196; *Cardigan v. Page*, 6 N. H. 183; *Ferris v. Adams*, 23 Vt. 136; *Gray v. Hook*, 4 N. Y. 449; *Filson v. Himes*, 5 Barr, 452; *Hunter v. Nolf*, 71 Penn. St. 282; *Duke v. Asbee*, 11 Ired. 112; *Grant v. McLester*, 8 Ga. 553; *Lewis v. Knox*, 2 Bibb, 453; *Outon v. Rodes*, 3 Marsh, 433.

<sup>8</sup> *Garforth v. Fearon*, 1 H. Bl. 327; *Waldo v. Martin*, 4 B. & C. 319; *R. v. Charretie*, 13 Q. B. 447; *Carleton v. Whitcher*, 5 N. H. 196; *Cardigan v. Page*, 6 N. H. 183; *Meguire v. Corwine*, 101 U. S. 108; *Boynton v. Hubbard*, 7 Mass. 119; *Bowers v. Bowers*, 26 Penn. St. 74; *Stroud v. Smith*, 4 Houst. 448; *Martin v. Wade*, 37 Cal. 168; *Gaston v. Drake*, 14 Nev. 175. See criticism of cases in Benj. on Sales, 3d Am. ed. §§ 516 *et seq.*

<sup>9</sup> *Graeme v. Wroughton*, 11 Ex. 146; *Waldo v. Martin*, 4 B. & C. 319; *Meacham v. Dow*, 32 Vt. 721. See *Swayze v. Hull*, 3 Halst. 54; *Ham v. Smith*, 87 Penn. St. 63, cited *infra*, § 410.

<sup>10</sup> *Supra*, § 403; *Meguire v. Corwine*, 101 U. S. 108; *Filson v. Himes*, 5 Barr, 452; *Anon.*, Lewis Cr. L. 126.

<sup>11</sup> *Com. v. Callaghan*, 2 Va. Ca. 460.

<sup>12</sup> *Wh. Cr.*, L. 8th ed. § 1375.

combinations, when limited to mere legislative compromises, form a criminal offence, it may be argued for several reasons that no suit for their enforcement would stand. (1) Bargains for votes are in themselves invalid. (2) The judiciary cannot, without transcending its functions, undertake to examine the motives of votes of legislators, or to impose damages in case such votes are not given in a particular way.<sup>1</sup>—A contract between two candidates for a public office by which one, for a specific consideration, shall withdraw in favor of another, is void.<sup>2</sup> And so of a contract by the marshal of a territory to give a subordinate office as consideration for receiving some private personal services from the appointee.<sup>3</sup>

§ 408. An agreement by which a trustee or director of a corporate body gives his influence for a particular candidate in exchange for a benefit received by himself, is void.<sup>4</sup> And of offices in which the public is interested, the appointing power cannot make a valid sale. “Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money be given to those who appoint, it may be a temptation to them to appoint improper persons.”<sup>5</sup>—An agreement by a trustee of a mining corporation to resign his trust for money is void.<sup>6</sup> “Trustees of corporations owe duties to others besides themselves; they have been placed in a position of trust by the stockholders, and to those stockholders they must be faithful. It is a violation of the trust for them to be bought out of office.”<sup>7</sup>—Specific perform-

<sup>1</sup> See as to legislative compromises, *supra*, § 402. In *Bolton v. Madden*, L. R. 9 Q. B. 55, an agreement by subscribers to a charity to vote for the same candidate for aid was sustained.

In *Gaston v. Drake*, 14 Nev. 175, an agreement between A. and B. by which A., in consideration of B.'s services in obtaining A.'s election as district attorney, was to divide the salary and emoluments with him, was held invalid.

<sup>2</sup> *Hunter v. Nolf*, 71 Penn. St. 282; *Benedict v. Ehler*, Lewis Cr. L. 126;

*Martin v. Wade*, 37 Cal. 168. See *Gray v. Hook*, 4 N. Y. 449.

<sup>3</sup> *Waldron v. Evans*, 1 Dak. Ter. 11.

<sup>4</sup> *Wardell v. R. R.*, 103 U. S. 656.

<sup>5</sup> *Blachford v. Preston*, 8 T. R. 89. See, however, *Bolton v. Madden*, L. R. 9 Q. B. 55; *supra*, § 407.

<sup>6</sup> *Forbes v. McDonald*, 54 Cal. 99.

<sup>7</sup> *Ibid.*, Myrick, J. See to same general effect; *Miller's Appeal*, 30 Penn. St. 478; *Bowers v. Bowers*, 26 Penn. St. 74.

ance will not be granted of a contract for the purpose of obtaining control of a national bank.<sup>1</sup>—"A director of a corporation cannot make for himself, or for his own benefit, a contract that will bind the company. The contract may be repudiated by the company at the instance of a stockholder."<sup>2</sup>—An agreement to grant diplomas on any ground except merit is void.<sup>3</sup>—"All arrangements by directors of a railroad company," also, "to secure an undue advantage to themselves at its expense, . . . are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration."<sup>4</sup> An agreement, therefore, by an officer of a railroad corporation to use his influence to locate the road in a particular line, is invalid.<sup>5</sup>

§ 409. An administrator being a public officer, an agreement by which he is to give any undue preferences is void. This has been held to be the case with a contract by an administrator to sell the real estate of his intestate on certain terms, and then to make title through the orphans' court;<sup>6</sup> and with an agreement to assume a debt on condition of the plaintiff relinquishing his right to letters of administration in favor of the defendant.<sup>7</sup>

So of agreements by administrators to give undue preferences

§ 410. On the same reasoning it has been held that when an election is contested, an agreement by one of the candidates to abandon the contest on the payment of a sum of money, is void.<sup>8</sup> And so of an agreement between candidates for the legislature, that one should withdraw in favor of the other.<sup>9</sup>

Agreement to withdraw from contesting election void.

<sup>1</sup> Foll's App., 91 Penn. St. 434.

<sup>2</sup> Reed, J., *Guild v. Parker*, 43 N. J. L. 435; citing Field on Corp. § 175; Green's Brice's *Ultra Vires*, 2d Am. ed. 477, note a, 479, note a.

<sup>3</sup> *Olin v. Bate*, 98 Ill. 53.

<sup>4</sup> Field, J., *Wardell v. Railroad Co.*, 103 U. S. 658; citing *Great Luxembourg R. R. v. Magney*, 25 Beav. 586; *Benson v. Hathaway*, 1 Y. & C. 326; *Flint, etc. R. R. v. Dewey*, 14 Mich.

477; *European R. R. v. Poor*, 59 Me. 277; *Drury v. Cross*, 7 Wall. 299.

<sup>5</sup> *Berryman v. R. R.*, 14 Bush, 755. See *infra*, § 414. As to perversions of trusts by trustees, see *supra*, § 378.

<sup>6</sup> *Myers v. Hodges*, 2 Watts, 381.

<sup>7</sup> *Bowers v. Bowers*, 26 Penn. St. 74. See *Miller's App.*, 30 Penn. St. 478.

<sup>8</sup> *Coppock v. Bower*, 4 M. & W. 361.

<sup>9</sup> *Ham v. Smith*, 87 Penn. St. 63; see *supra*, § 407.

§ 411. When a salary is given for the support of a public officer, a contract by which it is assigned to other parties, is void as against the policy of the law.<sup>1</sup> In England, it is true, it has been held that a partnership in the emoluments of permanent patent offices may be valid.<sup>2</sup> And a mortgage by an officer of the customs of his interest in the "Customs Benevolent Fund," erected by special act of parliament, has been in England held good.<sup>3</sup> But such appointments are in the nature of bounties and not of compensations for specific work.

§ 412. In England, a pension granted exclusively in consideration of past services is assignable. "But where the pension is granted not exclusively for past services, but as a consideration or retainer for some continuing duty or future service, although the amount of the pension may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."<sup>4</sup> In this country, assignments of federal pensions are prohibited by statute, though an agreement to professionally secure a pension for a contingent fee has been sustained.<sup>5</sup>

§ 413. A public officer is not entitled to receive payment from individuals for the performance of his public duties, unless in the shape of fees prescribed by law; and when such payments are made to an officer

<sup>1</sup> Ryall v. Rowles, 2 Wh. & T. Lead. Cas., with notes; Pollock, 289; Leake, 2d ed 727; citing Palmer v. Butc, 2 B. & B. 673 (case of a clerk of the peace); Barwicke v. Reede (that of a military officer); Cooper v. Reilly, 2 Sim. 560; Davis v. Marlborough, 1 Swanst. 74. In Osborne v. Williams, 18 Ves. 379, an agreement to pay over the profits of a contract was held void. In State Bank v. Hastings, 15 Wis. 83, it was held that an unqualified order by a judge, on the treasurer of the state to pay a forthcoming quarter's salary to a bank, bound the maker to a *bona fide* endorsee for value, though

the order was simply for collection, and was given without value. Paine, J., diss. The question of assignability of judicial salaries was not argued, the sole question being held to be whether the order was negotiable.

<sup>2</sup> Sterry v. Clifton, 9 C. B. 110.

<sup>3</sup> Maclean's Trusts, L. R. 19 Eq. 274.

<sup>4</sup> Parke, B., Wells v. Foster, 8 M. & W. 152; Leake, 2d ed. 728, referring to Priddy v. Rose, 3 Mer. 86; Tunstall v. Boothby, 10 Sim. 542; Spooner v. Payne, 4 Ex. 138.

<sup>5</sup> Painter v. Drum, 40 Penn. St. 467.

vested with discretionary power, they may subject the parties concerned to prosecutions for bribery.<sup>1</sup> In any view agreements by individuals to pay public officers specially for their services are generally void as against the policy of the law.<sup>2</sup> Hence, a promise to a constable of a reward for executing a warrant of arrest which it was his official duty to execute, is void;<sup>3</sup> and so of promises of extra payments to officers in executing criminal process.<sup>4</sup> It is otherwise, however, as to extra services, not prohibited by law.<sup>5</sup>

receive private payment for public services is invalid.

§ 414. Railroad corporations may be regarded as public institutions, bound, in exercising their franchises, not to be governed by private considerations. In accordance with this view an agreement between individuals and a railroad corporation by which the latter is to build a depot in a particular place in a large city, and to permit no other to be built within a specified distance, has been held void as against public policy;<sup>6</sup> and in some states the extreme position is taken that an agreement between a railroad company and individuals, to place, in consideration of payments to it, a depot at a particular spot, is void.<sup>7</sup> The same rule has been applied to an agreement not to establish a station within a certain distance of a particular point.<sup>8</sup> But notes given to a railway corporation in con- sideration of

Railroad bargains as to stations may be invalid.

<sup>1</sup> Wh. Cr. L. 8th ed. § 1857.

<sup>2</sup> *Infra*, § 502; *Pool v. Boston*, 5 Cush. 269; *Callaghan v. Hallett*, 1 Caines, 104; *Tilden v. Mayor*, 56 Barb. 340; *Walsh v. People*, 65 Ill. 58; *Huffman v. Greenwood*, 25 Kan. 64; *Macon v. Huff*, 60 Ga. 221; and cases cited *infra*, §§ 500-2.

<sup>3</sup> *Smith v. Whildin*, 10 Barr, 39; see *Commercial Bank v. Pleasants*, 6 Whart. 375.

<sup>4</sup> See *Pool v. Boston*, 5 Cush. 219; *Gilmore v. Lewis*, 12 Ohio, 281; *Com. v. Chapman*, 1 Va. Cas. 138.

<sup>5</sup> *Converse v. U. S.*, 21 How. U. S. 463; *Evans v. Trenton*, 4 Zab. 764; and cases cited *infra*, § 502.

<sup>6</sup> *Williamson v. R. R.*, 53 Iowa, 137; see *Cedar Rapids Bk. v. Hendrie*, 49 Iowa, 402.

<sup>7</sup> *Fuller v. Dame*, 18 Pick. 472; *Pacific R. R. v. Seely*, 45 Mo. 212; *Bestor v. Wathen*, 60 Ill. 138; *Marsh v. R. R.*, 64 Ill. 414; *Holladay v. Patterson*, 5 Oregon, 177. In *Southard v. R. R.*, 2 Dutch. 13; *Cumberland, etc., R. R. v. Babb*, 9 Watts, 458; and *Jewett v. R. R.*, 10 Ind. 539, where actions on such contracts were sustained, the question of illegality was not raised.

<sup>8</sup> *St. Louis, etc. R. R. v. Mathers*, 71 Ill. 592; *St. Joseph, etc. R. R. v. Ryan*, 11 Kan. 602.

ration of a promise to construct its road to a given point are not void as against public policy.<sup>1</sup>—As we have already seen,<sup>2</sup> contracts by railroad directors by which the patronage of their road is to be used for their private advantage, are void.

§ 415. Since any agreement to obstruct the course of justice is an indictable conspiracy at common law, such agreements are to be regarded as void, and incapable of sustaining a suit;<sup>3</sup> and this is the case with agreements for the suppression or perversion of testimony to be used in a judicial proceeding;<sup>4</sup> with agreements giving contingent fees to witnesses;<sup>5</sup> with secret agreements by particular parties to delay proceedings in a suit to the injury of other parties;<sup>6</sup> with agreements to pervert insolvent and bankrupt proceedings as means of fraud;<sup>7</sup> with agreements to covertly secure undue indulgences to the debtor;<sup>8</sup> and with agreements to suppress a criminal prosecution.<sup>9</sup>—That agreements to compound offences are void will be hereafter seen.<sup>10</sup>—It may be here noticed that an agreement for the collusive conduct of a divorce suit is void;<sup>11</sup> and so is an agreement not to expose immoral conduct.<sup>12</sup>

<sup>1</sup> Cedar Rapids Bk. v. Hendrie, 49 Iowa, 402; disapproving Holladay v. Patterson, 5 Oregon, 177.

<sup>2</sup> *Supra*, § 408.

<sup>3</sup> See *R. v. Hamp*, 6 Cox C. C. 167; *Dixon v. Olmstead*, 9 Vt. 310; *State v. Noyes*, 25 Vt. 415; *Com. v. McLean*, 2 Parsons, 367; *State v. Norton*, 3 Zab. 33; *Stoutenburg v. Lybrand*, 13 Oh. St. 228; *State v. McKistry*, 50 Ind. 465; *Porter v. Jones*, 52 Mo. 399; *Baker v. Farris*, 61 Mo. 389. "There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law. It consists of contracts void because of having a tendency to obstruct the administration of justice." Smith on Cont. 141, citing *Collins v. Blautern*, 2 Wils. 341; *Unwin v. Leaper*, 1 M. & Gr. 747; *E. C. L. R.*

*vol.* 39; *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371.

<sup>4</sup> Wh. Cr. L. 8th ed. §§ 1334 *et seq.*, § 1380; *Shaw v. Reed*, 30 Me. 105; *Southern Ex. Co. v. Duffey*, 48 Ga. 358; *Patterson v. Donner*, 48 Cal. 369.

<sup>5</sup> *Dawkins v. Gill*, 10 Ala. 206; *Willis v. Peckham*, 1 Br. & B. 515; and see *infra*, §§ 500 *et seq.*; *Collins v. Godefroy*, 1 B. & Ad. 950; though see *Grove v. McCalla*, 21 Penn. St. 44.

<sup>6</sup> *Elliott v. Richardson*, L. R. 5 C. P. 744.

<sup>7</sup> See *supra*, § 379; *Caldecott ex parte*, L. R. 4 Ch. D. 150.

<sup>8</sup> *Bracewell v. Williams*, L. R. 2 C. P. 196.

<sup>9</sup> *Barron v. Tucker*, 53 Vt. 338.

<sup>10</sup> *Infra*, §§ 483 *et seq.*

<sup>11</sup> *Hope v. Hope*, 8 D. M. G. 731 *supra*, § 394.

<sup>12</sup> *Brown v. Brine*, L. R. 1 Ex. D. 5.

§ 416. The right of free access to courts of justice is inalienable. Hence a condition that a title should be taken without investigation is void, and does not preclude investigation and litigation;<sup>1</sup> and so of an agreement that an insured party, if sued in a state court, will not remove the suit into a federal court.<sup>2</sup> No binding effect, also, will be awarded to resolutions of corporations by which their members are to renounce the right to appeal from their action to courts of law.<sup>3</sup>

Condition not as to have recourse to law void.

§ 417. So strongly is the right of free access to courts of justice maintained in England and in the United States that a party, by agreeing to arbitrate a claim (unless in pursuance of statutory authority), does not preclude himself from afterwards litigating the question in a court of justice.<sup>4</sup> Nor can the right to arbitrate be the subject of arbitration. It would be a *petitio principii* to say that an arbitration can determine whether the right of determining is incident to an arbitration.<sup>5</sup> And an award, under statute, to bind must comply with the statutory conditions.<sup>6</sup>

So as to agreement to finally arbitrate.

<sup>1</sup> Jones v. Clifford, L. R. 3 C. D. 779.

<sup>2</sup> Insurance Co. v. Morse, 20 Wal. 445.

<sup>3</sup> Player v. Archer, 2 Sid. 121; London v. Bernadiston, 1 Lev. 16; Ballard v. Bennett, 2 Burr. 778; Middleton's case, Dyer, 333 (a); Austin v. Searing, 16 N. Y. 123; White v. Brownell, 3 Ab. Pr. (N. S.) 318; 4 Ab. Pr. 162.

In Heath v. Gold Exchange, 7 Ab. Pr. (N. S.) 251, it was held that a rule of the Gold Exchange, an unincorporated society, that its members should be bound by the action of the board as to matters in dispute, did not preclude a member (who in the particular case resigned his membership) from obtaining an injunction to preclude the board from adjudicating the question in dispute. See to the same effect, Saffery *ex parte*, L. R. 4 Ch. D. 561; Leech v. Harris, 2 Brewst. 571; Dos Passos on

Stock Brokers, 81. But when the parties to a transaction agree to arbitrate, leaving the question to the decision of a board to which they mutually belong, and attend the proceedings of the arbitrating tribunal, they are bound by the result. Sonneborn v. Lavarello, 2 Hun, 201; Lafond v. Deems, 81 N. Y. 507.

<sup>4</sup> Street v. Rigby, 6 Ves. 815; Cooke v. Cooke, L. R. 4 Eq. 77; Hill v. More, 40 Me. 515; Pearl v. Harris, 121 Mass. 390; Hurst v. Litchfield, 39 N. Y. 377; and other cases cited Wald's Pollock 293. See, however, Davis v. Havard, 15 S. & R. 165; Bowen v. Cooper, 7 Watts, 311; and see 2 Pars. on Cont. 707-8.

<sup>5</sup> James, L. J., Llanelly R. R. v. N. W. R. R., L. R. 8 Ch. 948.

<sup>6</sup> Steele v. Lineberger, 59 Penn. St. 308.

## VIII.—CHAMPERTY AND MAINTENANCE.

§ 421. Champerty (*campi partitio*), which is an offence by the English common law, is an agreement for the division between the parties of a particular piece of property to be sued for by one of them.<sup>1</sup> The offence, in other words, consists in a speculation in lawsuits, it being agreed between the parties to divide the proceeds of a suit to be brought by one of them. Should a number of parties combine in such a way, public justice, it is argued, would be imperilled by the pressure which would be thus brought to bear on behalf of the suit so supported; and the danger would in most cases be aggravated by the fact that those who had this contingent interest in the success of the suit would work out of sight, or, if seen, would not be known to be parties in interest.<sup>2</sup> Several old English statutes make champerty and maintenance (to be presently defined) indictable; but these statutes are regarded merely as affirmations of the common law, and virtually absorbed in that law, so that with the modification of the common law the statutes have become modified.<sup>3</sup> In Missouri the statutes are not in force, though the principle will be applied in all cases where there is a vexatious stirring up of litigation.<sup>4</sup> The statutes are not in force in Vermont,<sup>5</sup> in Iowa,<sup>6</sup> in Delaware,<sup>7</sup> in Tennessee,<sup>8</sup> and in New Jersey.<sup>9</sup> In New York there is a special statute limiting the rule,<sup>10</sup> while Massachusetts and Rhode Island adopt the principle of the statutes as common law.<sup>11</sup>—An agreement by a third

Champerty is illegal sharing of profits of litigation.

<sup>1</sup> Steph. Dig. C. L. art. 141; Wh. Cr. L. 8th ed. § 1853; see Broughton v. Mitchell, 64 Ala. 210.

<sup>2</sup> See *De Houghton v. Money*, L. R. 2 Ch. 164.

<sup>3</sup> *Pechell v. Watson*, 8 M. & W. 691. Whether these statutes are in force in Pennsylvania is reserved in *Chester Co. v. Barker*, 97 Penn. St. 455. It has, however, been generally held that stat. 33 Ed. I. ch. 3 is not in force in that state. Roberts' Dig. 96; *Foster v. Jack*, 4 Watts, 334; *Gray v. Packer*, 4 W. & S. 17; 6 Penn. L. J. 309; *Sharswood Leg. Ethics*, 102.

<sup>4</sup> *Durke v. Harper*, 2 Mo. Ap. 1; 66 Mo. 51.

<sup>5</sup> *Danforth v. Sweeter*, 28 Vt. 490.

<sup>6</sup> *Wright v. Meek*, 3 Greene (Iowa), 472.

<sup>7</sup> *Bayard v. McLane*, 3 Har. 139.

<sup>8</sup> *Sherley v. Riggs*, 11 Humph. 53.

<sup>9</sup> *Schomp v. Schenck*, 40 N. J. L. 195.

<sup>10</sup> *Hassenfrats v. Kelly*, 13 John. 466; *Etheridge v. Cromwell*, 8 Wend. 629.

<sup>11</sup> *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Bank*, 9 Met. 489; *Martin v. Clark*, 8 R. I. 389.



party, in consideration of a share in the proceeds of the suit, to furnish information and evidence to support it, is against the policy of the law, and will not be enforced. "Besides the objection that a stranger has acquired an interest to carry on the litigation, the bargain to procure evidence for the consideration of a money payment has a direct and manifest tendency to pervert the course of justice."<sup>1</sup> This is eminently the case with regard to speculations in real estate.<sup>2</sup> It is otherwise, however, when a party interested makes such an agreement.<sup>3</sup> But generally contracts for the fomenting of litigation, enabling a party unwilling himself to bear the expense of a suit to undertake it under the auspices of others, are invalid as against the policy of the law. If he be so poor that if he be not aided justice may be defeated, then it is not improper to afford him aid to vindicate his rights;<sup>4</sup> but where he is not in such straits, and where the object of the aid is to stimulate him to a litigation which he would not otherwise encounter, then the contract is one which the courts should not enforce.<sup>5</sup> Whether a contract is champertous is determined by the law of the place of performance.<sup>6</sup>

<sup>1</sup> Per cur. in *Stanley v. Jones*, 7 Bing. 369; cited *Leake*, 2d ed. 732; *Sprye v. Porter*, 7 E. & B. 58; *Reynell v. Sprye*, 1 D. M. G. 660; *De Houghton v. Money*, L. R. 2 Ch. 164; *Wellington v. Kelly*, 84 N. Y. 543; *Holloway v. Lowe*, 7 Port. 488.

<sup>2</sup> *Whitaker v. Cone*, 2 John. Ca. 58; *McGoon v. Ankeny*, 11 Ill. 558; *Dexter v. Nelson*, 6 Ala. 68.

<sup>3</sup> *Wellington v. Kelly*, 84 N. Y. 543; see *Findon v. Parker*, 11 M. & W. 675; *infra*, §§ 422 *et seq.*

<sup>4</sup> *Perine v. Dunn*, 3 John. Ch. 508; *State v. Chitty*, 1 Bailey, 379, and cases cited *Wald's Pollock*, 303.

<sup>5</sup> See *Leake*, 2d ed. 295; *Reynell v. Sprye*, 1 D. M. G. 680-6; *Edwards v. Parkhurst*, 21 Vt. 472; *Brinley v. Whiting*, 5 Pick. 355; *Whitaker v. Cone*, 2 John. Ca. 58; *Dunbar v. Mc-*

*Fall*, 9 Hump. 505. Under local statutes the purchase of land in suit, knowing it to be in suit, for speculative purposes, and not in pursuance of a prior business bargain, may be void; see *Jackson v. Ketchum*, 8 Johns. 482; *Jackson v. Andrews*, 7 Wend. 152.

It is otherwise, as we will see, as to sales of personal property. *Infra*, § 424 *et seq.*

<sup>6</sup> *Supra*, § 361. It is also settled in England that the participation of others, under a contract for division of the proceeds, in the furtherance of a suit, is no defence to the suit, nor ground for injunction. *Leake*, 2d ed. 731; *Hilton v. Woods*, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 367. In *Courtright v. Burns* (U. S. Cir. Ct. Mo. 1881), 14 Cent. L. J. 89, it was held that the fact of the existence of a

§ 422. Maintenance does not necessarily involve a contingent division of the profits, and consists in an agreement, by a

champertous agreement between the plaintiff and his attorney, is no ground for the dismissal of the suit. "The answer," said McCrary, J., "alleges that this suit being prosecuted by one of the attorneys for plaintiff, upon a champertous contract, by which he is to pay the expenses of the litigation and receive as his compensation forty per cent. of the sum realized, the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty; the testimony of the defendant himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note, by the proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon, upon the ground that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it? The authorities upon this question are in conflict. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner, it should refuse longer to entertain the proceeding. *Barker v. Barber*, 14 Wis. 142; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deadrick*, 10 Humph. 142; *Greenman v. Cohee*, 61 Ind. 201.

"Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defence thereto, and can only be set up by the client against the attorney when

the champertous agreement itself is sought to be enforced. *Hilton v. Woods*, L. R. 4 Eq. Cas. 432; *Elborough v. Ayres*, L. R. 10 Eq. Cas. 367; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robison v. Beall*, 26 Ga. 17; *Allison v. R. R.*, 42 Iowa, 274; *Small v. R. Co.*, 55 Iowa, 582. This latter view is in my judgment supported by the better reason. It is not necessary for the full protection of the client to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement; nor are there any reasons founded on public policy that should require such dismissal. If all champertous agreements shall be held void and courts firmly refuse to enforce them, they will thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid and binding contract may avoid liability or prevent a recovery by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champerty, reaching very far beyond that which attaches to any other illegal contract. The defendant in such case is no party to the champerty; he is not interested in it nor in any wise injured by it. If the contract upon which he is sued is a *bona fide* contract upon which a sum of money is due from him to the plaintiff, and if he has no defence upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fee and expenses of the suit.

"The tendency of the courts in this

party having no pecuniary interest in a suit, to aid in promoting its litigation.<sup>1</sup> That maintenance, in this sense, is no longer an indictable offence in England, is illustrated by the fact that, in the Tichborne litigation, parties having no pecuniary interest in the result not only were permitted without prosecution to canvass the country for support for the claimant, but were adjudged in so doing, notwithstanding the publicity and excitement that attended their proceedings, not to be guilty of a contempt of court.<sup>2</sup> It should be noticed, also, that the English courts have sustained purchases of shares in a company for the purpose of instituting suits to restrain the directors from acts alleged to be illegal.<sup>3</sup> In this country, though there are jurisdictions in which maintenance is held an offence at common law,<sup>4</sup> the prevalent opinion is that it is with us no longer indictable, and hence that agreements by persons to promote

Maintenance is stirring up unfounded litigation.

country is stronger in the direction of relaxing the common-law doctrine concerning champerty and maintenance so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has, in a great measure, passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. *Sedgwick v. Stanton*, 14 N. Y. 289; *Voorhees v. Dorr*, 51 Barb. 580; *Richardson v. Rowland*, 40 Conn. 572; *Matthewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Lyttle v. State*, 17 Ark. 609.

"The common-law doctrine, however, prevails in Missouri, according to the doctrine of the supreme court of the state, in *Duke v. Harper*, 66 Mo. 55. While following that ruling, I am disposed, in view of the general tendency of American courts, to relax

somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to allow debtors to make use of it to avoid the payment of their honest obligations.

"It follows that the defence of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled."

<sup>1</sup> Wh. Cr. L. 8th ed. § 1854.

<sup>2</sup> *R. v. Skipworth*, 12 Cox C. C. 371; Wh. Cr. Pl. and Pr. § 957. See *Com. v. Dupuy*, Bright. 44; S. C., 4 Clark, 1.

<sup>3</sup> *Bloxam v. R. R.*, L. R. 3 Ch. 353. That the maintenance statutes are now regarded as obsolete in England, see editorial notice of *Bradlaugh v. Newdegate*, in *London Law Times*, Sept. 24, 1881, 345.

<sup>4</sup> *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bk.*, 9 Met. 489; *Martin v. Clark*, 8 R. I. 389; *Elliott v. McClelland*, 17 Ala. 206; *Duke v. Harper*, 66 Mo. 51; *Hayney v. Coyne*, 10 Heisk. 339. See *Newkirk v. Cone*, 18 Ill. 449; *Thompson v. Reynolds*, 73 Ill. 11; *Backus v. Byron*, 4 Mich. 535.

suits in which they have no pecuniary interest are not, in themselves, void.<sup>1</sup> It has been held, also, in England, that the common law is not in this respect in force in India.<sup>2</sup> And a transaction is not void on this ground unless it be "something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."<sup>3</sup> Mr. Pollock, in citing this passage, says that "it fairly represents the principles on which English judges have acted in the modern cases."<sup>4</sup>

§ 423. An agreement, also, by which a party seeking to establish his title to property, divides it with parties who are to aid him in collecting information by which his title may be secured, is not in itself invalid;<sup>5</sup> and were a contrary view to be held, not only few agreements for the vindication of patent and other rights could stand, but contracts for the sale of goods would be vitiated in all cases in which it became subsequently necessary to resort to litigation to establish the title to such goods.<sup>6</sup> It should be added that there are few business adventures that do not involve sales on shares.<sup>7</sup>

Agreement  
to sell  
claims on  
shares not  
invalid.

<sup>1</sup> *Roberts v. Cooper*, 20 How. 467; *Danforth v. Streeter*, 28 Vt. 490; *Richardson v. Rowland*, 40 Conn. 565; *Voorhees v. Dorr*, 51 Barb. 580; *Peck v. Briggs*, 3 Denio, 107; *Sedgwick v. Stanton*, 14 N. Y. 259; *Schomp v. Schenck*, 40 N. J. L. 195; *Bayard v. McLane*, 3 Harring. 139; *Sherley v. Riggs*, 11 Humph. 53; *Wright v. Meek*, 3 Greene (Iowa), 472.

<sup>2</sup> *Ram Coomar v. Chunder Canto*, L. R. 2 Ap. Ca. 186.

<sup>3</sup> *Fischer v. Kamala Naicker*, 8 Moo. Ind. Ap. 170.

<sup>4</sup> Pollock, 3d ed. 319. In *Findon v. Parker*, 11 M. & W. 675, Lord Abinger confined maintenance "to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences they have no right to

make." See *Baker v. Whiting*, 3 Sumner, 475; *Call v. Calef*, 13 Mete. 362; *Thalhimer v. Brinckerhoff*, 3 Cow. 647, to same effect.

<sup>5</sup> *Sprye v. Porter*, 7 E. & B. 58.

<sup>6</sup> See *Wilson v. Short*, 6 Hare, 366; *Dickinson v. Burrell*, L. R. 1 Eq. 337.

<sup>7</sup> Mr. Pollock (3d ed. 319) states the law as follows: "It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing that interest; but it is unlawful to purchase merely for the purpose of litigation." Hence, it has been held that the creditor of an insolvent company may sell his claim, but that he cannot sell the right to proceed on a winding-up petition. *Paris Skating Rink Co. in re*, L. R. 5 Ch. D. 959.

§ 424. It has just been observed that, while an agreement to share a property or right not yet in possession with one aiding in establishing it is not in itself invalid, such an agreement becomes invalid when its consideration is the supplying of evidence to sustain a pending litigation. It is hard to see why the mere fact of bringing a suit should make invalid what would otherwise be valid; nor is it likely that in a case in which there is an honest and fair agreement by a party to sustain by money and personal service the vindication of a contested claim, the validity of such an agreement would be made to depend upon whether a suit on the claims had already been brought. But there is a wide difference between the sale of property on which a question of title subsequently arises, and the sale of a merely speculative claim. It is against the policy of the law that claims of this kind should be hawked about in the market, for the same reason that it is against the policy of the law that gambling ventures should be put up for sale. Hence, it has been held that the assignment of an alleged claim against trustees for breach of trust is void.<sup>1</sup> And this has been decided to be the case with regard to claims to salvage,<sup>2</sup> and with regard to suits for the redress of personal wrong, which, it has been said, are not marketable commodities, and have no settled business value.<sup>3</sup> With this is to be considered the settled rule that, pending litigation, neither party can be permitted to alienate the contested property so as to prejudice the rights of the other.<sup>4</sup> But there is nothing (saving the rights of third parties) in the mere fact that a claim is in litigation to prevent the sale to third parties, provided the object of the sale be not to foment litigation, but to dispose of a right.<sup>5</sup> Were

Purchase  
on speculation  
of suit  
void.

<sup>1</sup> *Hill v. Boyle*, L. R. 4 Eq. 260. See 582; *Sawyer v. Phaley*, 33 Vt. 69; *Prosser v. Edmonds*, 1 Y. & C. 481; *Dovey's App.*, 97 Penn. St. 153. As to *Bell v. Smith*, 5 B. & C. 188; *Hilton v. set-off*, see *infra*, §§ 1025 *et seq.*

*Woods*, L. R. 4 Eq. 432.

<sup>2</sup> *The Rosario*, L. R. 2 Adm. D. 41.

<sup>3</sup> *Ibid.*; *Wald's Pollock*, citing *Norton v. Tuttle*, 60 Ill. 130; *Marshall v. Means*, 12 Ga. 61; *Morrison v. Deaderick*, 10 Humph. 342.

<sup>4</sup> *Bellamy v. Sabine*, 1 De G. & J.

<sup>5</sup> 2 Story Eq. Jur. § 1050; *Stanley v. Jones*, 7 Bing. 377; *Harrington v. Long*, 2 M. & K. 590; *Williams v. Protheroe*, 5 Bing. 309 (cited *Leake*, 2d ed. 733); *Thallhimer v. Brinckerhoff*, 3 Cow. 647.

it otherwise, (1) all that would be necessary to make property inalienable would be to subject it to litigation, and (2) a poor person, having a just claim, could not raise money on that claim, and consequently would have to surrender it because he is poor.<sup>1</sup>

§ 425. Partners jointly interested in a suit may bind themselves to divide the expenses of litigation, although their rights and interests are several;<sup>2</sup> and this applies whenever there is an honest belief in a common interest,<sup>3</sup> and where the relation between the parties is that of principal and agent, or master and servant.<sup>4</sup>

§ 426. For several reasons an attorney is precluded from purchasing his client's claim when in litigation:

Attorney cannot purchase client's interest.

1. If in ordinary cases purchases of litigated claims are invalid when for speculative objects, this limitation should be applied with peculiar rigor to a class of agents who, as with attorneys, have their special business in the management of litigation. 2. An attorney is his client's confidential adviser, and a sale to him is invalid on the ground that all sales to confidential advisers are invalid.<sup>5</sup> 3. An attorney is an officer of the court, and the dignity and just influence of the office would be destroyed if he is to have a contingent personal interest in the result of the litigation in which he is engaged. Hence, as a rule, a purchase by an attorney of a claim he is litigating on behalf of his client is against the policy of the law, and he will not be permitted to avail himself of such a purchase unless it should appear that the sale was fair, was not in any way under restraint, and was made under independent advice.<sup>6</sup> But an assignment by the

<sup>1</sup> It was held, "as long ago as 21 Ed. III., that a purchase of property pending a suit affecting the title to it is not of itself champerty." Pollock, 3d ed. 317, citing 2 Ro. Ab. 113 B.

<sup>2</sup> Findon v. Parker, 11 M. & W. 675; Call v. Calef, 13 Met. 362; and cases cited Wald's Pollock, 303; Wellington v. Kelly, 84 N. Y. 543.

<sup>3</sup> Williamson v. Henley, 6 Bing. 299; Vaughan v. Marable, 64 Ala. 60.

<sup>4</sup> Elborough v. Ayres, L. R. 10 Eq. 367.

<sup>5</sup> *Supra*, § 378. See on this topic 14 Cent. L. J. 168; and see Rogers v. Mining Co., 9 Fed. Rep. 721.

<sup>6</sup> *Supra*, § 161; Wh. on Agency, § 574; Hall v. Hallett, 1 Cox, 134; Wood

client to his lawyer by way of compensation for services rendered will be sustained,<sup>1</sup> provided there be no undue influence exercised.<sup>2</sup>

§ 427. It is a moot question how far an agreement between counsel and client for a contingent fee to the counsel will be sustained.<sup>3</sup> The following distinctions, however, may be suggested: (1) When the suit is purely speculative, *e. g.*, a suit for damages, such an agreement partakes of the nature of a gambling contract, and will not be enforced by the courts.<sup>4</sup> (2) Nor will it be enforced when extortionate.<sup>5</sup> Hence, a contract that attorneys at law should receive half the land in litigation if successful is invalid.<sup>6</sup> (3) But when there is an interest in litigation which the client has not the means to pursue, an agreement freely entered into by him, to give a fair share in

Agreement for contingent fees not necessarily unlawful.

*v. Downes*, 18 Ves. 120; *Simpson v. Lamb*, 7 E. & B. 84; *Dunn v. Record*, 63 Me. 17; *Stanton v. Haskin*, 1 Mac-Ar. 558; *Arden v. Patterson*, 5 Johns. Ch. 48; *Coughlin v. R. R.*, 71 N. Y. 443; *West v. Raymond*, 21 Ind. 305. In *Coughlin v. R. R.*, 71 N. Y. 443, Earl, J., said: "An attorney may stipulate with his client for any compensation they may agree upon, and such compensation may be absolute or contingent; but he may not purchase a claim for prosecution, and he may not advance, or agree to advance, any money for the purpose of inducing a party to place a claim in his hands for collection."

<sup>1</sup> *Anderson v. Radcliffe*, E. B. & E. 806, 819.

<sup>2</sup> As to undue influence see *supra*, § 161. In *Knight v. Bowyer*, 2 De G. & J. 445, Turner, L. J., said: "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject, of course, if he purchases from a client, to the consequences of that relation." See remarks of Exchequer Chamber, in *Anderson v. Radcliffe*, E. B. &

E. 806. The New York statute prohibiting attorneys from purchasing bonds and choses in action for the purpose of bringing suit on them, does not apply to purchase of stock in corporations. *Ramsey v. Gould*, 57 Barb. 399.

<sup>3</sup> See Sharswood's Legal Ethics, 102. In 23 Alb. L. J. 484; 24 Alb. L. J. 4, 18, 24, the question is discussed at large, and the ground is taken that such agreements are against the policy of the law. A reply to the latter papers was published by Judge Countryman, in Albany, 1882, under the title, "Compensation for Legal Services."

<sup>4</sup> *Martin v. Clarke*, 8 R. I. 389; *Halloway v. Lowe*, 7 Port. 488.

<sup>5</sup> *Gardener v. Ennor*, 35 Beav. 549; *Thurston v. Percival*, 1 Pick. 415; *Phillips v. Overton*, 4 Hayw. 291; *Rose v. Mynett*, 7 Yerg. 30; *Scoby v. Ross*, 13 Ind. 107; *Cognillard v. Bearss*, 21 Ind. 479; *Boardman v. Brown*, 25 Iowa, 488; *Lecatt v. Sallee*, 3 Port. 115; *Halloway v. Lowe*, 7 Port. 488; *Byrd v. Odem*, 9 Ala. 755; *Elliott v. McClelland*, 17 Ala. 206.

<sup>6</sup> *Jenkins v. Bradford*, 59 Ala. 400.

the proceeds to his counsel in consideration of aid given in the management of the suit, may be sustained.<sup>1</sup> In this country, we have numerous rulings sustaining contracts for contingent fees that were not in themselves extortionate, and were free from fraud or abuse of confidential relations.<sup>2</sup> In England, however, an agreement with an attorney for a contingent percentage has been held invalid;<sup>3</sup> and we have cases in this country, which, while admitting the lawfulness of contingent fees within the limits above stated, hold that when they amount to a sharing of the proceeds of a speculative litigation, they are illegal,<sup>4</sup> and that they are illegal when they

<sup>1</sup> See *Williams v. Protheroe*, 5 Bing. 309.

<sup>2</sup> *Wylie v. Cox*, 15 How. 415; *Stanton v. Embrey*, 93 U. S. 556; *McPherson v. Cox*, 96 U. S. 404; *Scott v. Harmon*, 109 Mass. 237; *Haight v. Moore*, 37 N. Y. Sup. Ct. 161; *Porter v. Parmly*, 39 N. Y. Sup. Ct. 219; *Marsh v. Holbrook*, 3 Abb. Ct. of Ap. 176; *Schomp v. Schenck*, 40 N. J. L. 195; *Strohecker v. Hoffman*, 19 Penn. St. 227; *Dickerson v. Pyle*, 4 Phila. 259; *Bayard v. McLane*, 3 Harring. 139; *Equit. Life Ass. v. Poe*, 53 Md. 28; *Major v. Gibson*, 1 Pat. & H. 48; *Allard v. Lamirande*, 29 Wis. 502; *Evans v. Bell*, 6 Dana, 479; *Cross v. Bloomer*, 6 Baxter, 74; *Moses v. Bagley*, 55 Ga. 283; *Hunt v. Test*, 8 Ala. 713; *Martinez v. Vives*, 32 La. An. 305; see *Plitt ex parte*, 2 Wal. Jr. 453; *Trist v. Child*, 21 Wal. 441. In *Duke v. Harper*, 66 Mo. 51, it was held that a contingent fee was not champertous unless the attorney agreed to pay part of the expense of litigation. In *Chester County v. Barber*, 97 Penn. St. 455, the supreme court of Pennsylvania held that it was not within the power of county commissioners to make a contract giving a contingent fee of fifty per cent. See, also, *Meguire v. Corwine*, 101 U. S. 111. That in contracts of

this class the burden is on the attorney to prove fairness, see *Nesbit v. Lockman*, 34 N. Y. 167; *Hitchings v. Van Brunt*, 38 N. Y. 335.

<sup>3</sup> *Earle v. Hopwood*, 9 C. B. N. S. 566; *Pine v. Beattie*, 32 L. J. C. 734.

<sup>4</sup> *Stanton v. Haskin*, 1 MacAr. 558; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Bank*, 9 Met. 489; *Boardman v. Brown*, 25 Iowa, 502; *Holloway v. Lowe*, 7 Port. 488; *Elliott v. McClelland*, 17 Ala. 206; see *Evans v. Ellis*, 5 Denio, 640; *Howell v. Ransom*, 11 Paige, 538.

In *Ackert v. Barker*, 131 Mass. 436, the defendant, in a suit by his client to recover \$1000, set up that he was entitled to retain one-half the amount as his fee; and he testified to an agreement to this effect, and that he was not to be responsible for the expenses of the suit. It was held that the agreement was invalid. "The defendant's answer and bill of exceptions," said Gray, C. J., "fairly construed, show that the agreement set up by the defendant was an agreement by which, in consideration that an attorney should prosecute suits in behalf of his client for certain sums of money, in which he had himself no previous interest, it was agreed that he should keep one-half of the amount recovered



provide for furnishing the funds to conduct the suit.<sup>1</sup>—Should the agreement between the client and attorney be void for

in case of success, and should receive nothing for his services in case of failure.

“By the law of England from ancient times to the present day such an agreement is unlawful and void for champerty and maintenance, as contrary to public justice and professional duty, and tending to speculation and fraud, and cannot be upheld, either at common law or in equity. 2 Rol. Ab. 114; Lord Coke, 2 Inst. 208, 564; Hobart, C. J., *Box v. Barnaby*, Hob. 117 a; Lord Nottingham, *Skapholme v. Hart*, Finch, 477; S. C., 1 Eq. Cas. Ab. 86, pl. 1; Sir William Grant, M. R., *Stevens v. Bagwell*, 15 Ves. 139; Tindal, C. J., in *Stanley v. Jones*, 7 Bing. 369, 377; S. C., 5 Moore & Payne, 193, 206; Coleridge, J., in *re Masters*, 1 Har. & Wall. 348; Shodwell, V. C., *Strange v. Brennan*, 15 Sim. 346; Lord Cottenham, S. C. on appeal, 2 Coop. Temp. Cottenham, 1; Earle, C. J., *Grell v. Levy*, 16 C. B. (N. S.) 73; Sir George Jessel, M. R., in *re Attorneys' & Solicitors' Act*, 1 Ch. D. 573.

“It is equally illegal by the settled law of this commonwealth. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Metc. 489; *Swett v. Poor*, 11 Mass. 549; *Allen v. Hawks*, 13 Pick. 79, 83; *Call v. Calef*, 13 Metc. 362; *Rindge v. Coleraine*, 11 Gray, 157, 162; 1 Dane, Ab. 296; 6 id. 740, 741. In *Lathrop v. Amherst Bank*, the fact that the agreement did not require the attorney to carry on the suit at his own expense was adjudged to be immaterial. 9 Metc. 492. In *Scott v. Harmon*, 109 Mass. 237, and in *Tapley v. Coffin*, 12 Gray, 420, cited for the defendant, the attorney had not agreed to look for his compensation to that alone which might be recovered, and

thus to make his pay depend upon his success.

“The law of Massachusetts being clear, there would be no propriety in referring to the conflicting decisions in other parts of the country. If it is thought desirable to subordinate the rules of professional conduct to mercantile usages, a change of our law in this regard must be sought from the legislature and not from the courts.

“The defendant, by virtue of his employment by the plaintiff, and of his professional duty, was bound to prosecute the claims entrusted to him for collection, and holds the amount recovered as money had and received to the plaintiff's use. The agreement set up by the defendant that he should keep one-half of the amount, being illegal and void, he is accountable to the plaintiff for the whole amount, deducting what the jury have allowed him for his services and costs. In *re Moshers and Grell v. Levy*, above cited; *Pince v. Beattie*, 32 L. J. (N. S.) Ch. 734. Of *Best v. Strong*, 2 Wend. 319, on which the defendant relies as showing that, assuming this agreement to be illegal, the plaintiff cannot maintain this action, it is enough to say that there the money was voluntarily paid to the defendant with the plaintiff's assent, after the settlement of the suit by which it was recovered; and it is unnecessary to consider whether, upon the facts before the court, the case was well decided.”

<sup>1</sup> *Martin v. Clarke*, 8 R. I. 389; *Weakly v. Hall*, 13 Ohio, 167; *Stearns v. Felker*, 28 Wis. 594; *Meeks v. Dewberry*, 57 Ga. 263; *Holloway v. Lowe*, 7 Port. 488; and other cases cited in *Wald's Pollock*, 296; *Story on Cont.* § 713. As deprecating the practice,

champerty, the attorney is entitled to recover on a *quantum meruit*.<sup>1</sup>

§ 428. The difference between the English practice and our own in this relation may be in part attributable to the fact that in England a contract by a barrister for a fee for his professional services is invalid and cannot be enforced.<sup>2</sup> In the United States there is no jurisdiction in which suit cannot be maintained on such contracts.

§ 429. The taint of champerty only invalidates contracts as between the parties to champerty. The better opinion is that it is no defence to a suit on a claim that the plaintiff has made a champertous bargain concerning it with his attorney.<sup>3</sup> The right to attack a contract on the ground of champerty belongs, on principle, only to the parties immediately concerned. And it is clear that subsequent assignees of property obtained by a champertous contract cannot be prejudiced by the champerty in which they were not participants.

though not asserting its illegality, see *Plitt ex parte*, 2 Wall. Jr. 453; *Foster v. Jack*, 4 Watts, 339. *Wright v. Tebbitts*, 91 U. S. 252, was a case where the contract was made "after the service had been rendered, and after, as was supposed, the claim had been secured." The contract, which was for ten per cent., was sustained.

In *Coughlin v. R. R.*, 71 N. Y. 443, it was held that a client by releasing his claim could defeat his attorney's contingent interest. *S. P. Britton v. Base*, 23 Pitts. L. J. 181.

In *Adye v. Hanna*, 47 Iowa, 264, an agreement by an attorney, in case the client would appeal and pay his fees in case of success, to pay any judgment that might ultimately be entered against the client, was held void. See to same effect, *Lewis v. Lewis*, 15 Ohio, 715. *Boardman v. Brown*, 25 Iowa, 487.

<sup>1</sup> *Stearns v. Folker*, 28 Wis. 594; *infra*, § 711.

<sup>2</sup> *Kennedy v. Brown*, 13 C. B. (N. S.) 677.

<sup>3</sup> *Hilton v. Woods*, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 367; *Courtright v. Burns*, U. S. Cir. Ct. Mo. 1882, 13 Rep. 261; 14 Cent. L. J. 89; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Allison v. R. R.*, 42 Iowa, 274; *Small v. R. R.*, 55 Iowa, 582; *Robison v. Beall*, 26 Ga. 17. See, *contra*, *Greenman v. Cohee*, 61 Ind. 201; *Barker v. Barker*, 14 Wis. 142; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342.

As has been already observed, in some of the states the common law rule is no longer considered obligatory, and it has been held that no contract is, on the ground that it is infected with champerty, now invalid unless it contravenes some existing statute of the state. *Sedgwick v. Stanton*, 14 N. Y. 289; *Voorhees v. Dorr*, 51 Barb. 580; *Richardson v. Rowland*, 40 Conn. 572; *Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*,

## IX. RESTRAINT OF TRADE.

§ 430. Life, liberty, and the privilege of pursuing any employment not prohibited or limited by the state are rights of which no person can divest himself by a binding contract. *Jus publicum privatorum voluntate mutari nequit.* Hence an agreement by which life is to be taken is void;<sup>1</sup> and so of an agreement that a party's liberty should be restrained;<sup>2</sup> or that fundamental constitutional privileges should be surrendered.<sup>3</sup> In the same line may be placed agreements by a party that he will abstain everywhere from the exercise of a particular business of which the state permits the exercise.<sup>4</sup> Such agreements are prejudicial to the body politic in depriving the community of the labor of men in the spheres in which they are likely to be most useful, and in establishing monopoly by the buying out of competition.<sup>5</sup>

Agreements to surrender inalienable rights are void.

45 ib. 564; *Lytle v. State*, 17 Ark. 608. The common law doctrine, however, as has been stated, prevails in Missouri, according to the doctrine of the supreme court of the state in *Duke v. Harper*, 66 Mo. 55. See observations of McCrary, J., *Courtright v. Burns*, *ut supra*.

<sup>1</sup> Wh. Cr. L. 8th ed. § 145.

<sup>2</sup> *Ibid.* § 146; *Smith v. Com.*, 14 S. & R. 69.

<sup>3</sup> *Ibid.* § 145 *a*.

<sup>4</sup> *Leake*, 2d ed. 735; *Mitchel v. Reynolds*, 1 P. Wms. 195; *Whitney v. Slayton*, 40 Me. 224; *Alger v. Thacher*, 19 Pick. 51; *Taylor v. Blanchard*, 13 Allen, 370; *Nobles v. Bates*, 7 Cow. 307; *Dakin v. Williams*, 11 Wend. 67; *Keeler v. Taylor*, 53 Penn. St. 467; *Gompers v. Rochester*, 56 Penn. St. 194; *Harkinson's App.*, 78 Penn. St. 196; *Davis v. Barney*, 2 Gill & J. 382; *Lange v. Werk*, 2 Oh. St. 520; *Craft v. McConoughy*, 79 Ill. 346; *Jenkins v. Temples*, 39 Ga. 655; *Callahan v. Donnelly*, 4 Cal. 152. In *Keeler v. Taylor*, 53 Penn. St. 468, Keeler agreed to instruct Taylor in the art of

making platform scales, and to employ him in that business. Taylor was to pay Keeler \$50 for each scale he should make for any other person than Keeler, or which should be made through information given by him. The court held that this was an unreasonable restriction on Taylor's liberty of action, and that the contract was invalid. "Though contracts," so said the court, "for partial restraints may be good at law, equity is loath even then to enforce them, and will not do so if the terms be at all hard or even complex." "If it were not void, however, a chancellor would regard the hardships of the bargain and the prejudice to the public, and would withhold his hand in enforcing it."

As authorities to the effect that liberty of travel is not to be restrained, see *State v. Hartford & N. H. R. R.*, 29 Conn. 538.

<sup>5</sup> *Frost v. Belmont*, 6 Allen, 152. See *Alger v. Thacher*, 19 Pick. 51, where Judge Morton says: "The unreasonableableness of contracts in restraint

§ 431. An agreement, therefore, by which a party, entitled to do a particular business, binds himself generally not to do

of trade and business is very apparent from several considerations: 1. Such contracts injure the parties making them, because they diminish their means of obtaining livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils such as these wise laws protect individuals and the public by declaring all such contracts void." Compare *Perkins v. Clay*, 54 N. H. 518; *Fuller v. Dame*, 18 Pick. 472.

In *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59, *Wickens, V.-C.*, thus speaks: "There has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases that a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void. This seems to have been treated as clear law in *Ward v. Byrne* (5 M. & W. 548) and

in *Hinde v. Gray* (1 M. & G. 195), and in other cases; and the rule, if not obviously just, is at any rate simple and very convenient. No doubt, in the case of *The Leather Cloth Company v. Lhorsont* (21 L. T. Rep. N. S. 661; L. Rep. 9 Eq. 345), *James, L. J.* (then vice-chancellor), threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area."

From this *Fry, J.*, in *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351, 42 L. T. N. S. 679, dissents, holding that there is no absolute rule as to space; citing to this effect the observations of *Bramwell, B.*, in *Jones v. Lee*, 1 H. & N. 189. *Rousillon v. Rousillon*, however, was a case of breach of trust by an agent, and not of a violation of an agreement in a sale of good-will. See *infra*, §§ 435, 437. The plaintiffs were champagne merchants at Epernay, in France. The defendant, whose name was the same as that of the plaintiffs, having entered their house and learnt the business, acted for two years as their representative in England, and then wrote a letter to them, by which he undertook not to represent any other champagne house for two years after leaving the plaintiffs' employment, and not to establish himself or associate himself with other persons or houses in the champagne trade for ten years after leaving them. The defendant left the plaintiffs' employment in March, 1877, and in May, 1878, commenced business in London as a retail wine merchant, and sold champagne as well as other wines. In his circulars and advertisements, and on the labels and corks of the champagne bottles, were the words "Ay (champagne)," but he had no establishment

such business, is void on the ground that the right to do business, under such limits as the state prescribes, is an inalienable right, of which no person can divest himself.<sup>1</sup> It is otherwise, however, as to an agreement not to do business in a particular place. A professional man or tradesman, for instance, may have built up a business in a particular neighborhood, which, on account of health, or for other reasons, he is desirous of leaving. Now, so far from trade being restrained by permitting him to sell the good-will of this business, trade is furthered by such an agreement, since in this way business energies, which might otherwise be lost, are preserved. The party moving away obtains something like a price for his past labors; the market value of labor of the same class is placed on a more definite footing; and while he is able to pursue his calling elsewhere under more convenient conditions, immediate activity is given to his successor, whom the climate and other qualities of the place transferred may suit.<sup>2</sup> "It may

Agreement binding party not to do business in a particular place may be sustained.

anywhere except in London. It was held that the defendant had committed a breach of the agreement, and that the restriction was not larger than was necessary for the proper protection of the plaintiffs. The application was for an injunction; and, as the case was a breach of trust, it stood on different grounds from infringements of agreements in sales of good-will. See, also, as to breaches of trust, *infra*, § 435. Mr. Pollock, 3d ed. 335, holds *Allsopp v. Wheatercroft* to be in direct conflict with *Rousillon v. Rousillon*. As to danger of assuming public policy as a test, see *Hilton v. Eckersley*, 6 E. & B. 47; *Hill v. Spear*, 50 N. H. 274.

In *Mallon v. May*, 13 M. & W. 511, Parke, B., adopted the rule of *Tindal, C. J.*, in *Horner v. Graves*, 7 Bing. 743, that "whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void." This is adopted by Mr. Benjamin (*Sales*, 3d Am. ed.

§ 527), and is sustained, according to the learned editor, by *Leather Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; see *Lange v. Werk*, 2 Oh. St. 519.

A covenant not to sell marl off the vendor's remaining adjacent land has been held void. *Brewer v. Marshall*, 4 C. E. Green, 537. And so of an agreement not to manufacture goods in general. *Taylor v. Blanchard*, 13 Allen, 370; *Keeler v. Taylor*, 53 Penn. St. 468; though see *Gillis v. Hall*, 2 Brewst. 342.

<sup>1</sup> See *Horner v. Graves*, 7 Bing. 743; *Crawford v. Wick*, 18 Oh. St. 190; *Beard v. Dennis*, 6 Ind. 200.

<sup>2</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181; and notes in 1 Smith's Leading Cases; *Mallon v. May*, 11 M. & W. 653; *Leather Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; *Whitney v. Slayton*, 40 Me. 224; *Dean v. Emerson*, 102 Mass. 480; *Noble v. Bates*, 7 Cow. 307; *Richardson v. Peacock*, 33 N. J. Eq. 597; *Guerand v. Dandelet*, 32 Md. 561;

even be beneficial to the country," argues Judge Story, "that a particular place should not be overstocked with artisans or other persons engaged in a particular trade or business;<sup>1</sup> or a particular trade may be promoted by being for a short period limited to a few persons; especially if it be a foreign trade, recently discovered, and it can be beneficial but to a small body of adventurers."<sup>2</sup> Hence contracts by which a party agrees not to carry on a specific business within certain reasonable limits, will be sustained. "When a limit of space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade—he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefits of the trade being carried on, because the party with whom the contract is made will probably within those limits exercise it himself. But where a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit in return."<sup>3</sup> On the other hand, the protection is to be made commensurate with the risk; and, as we have seen, a confidential agent will not be permitted to carry on a business in any place competing with employers with whom he promised not to compete.<sup>4</sup>

Warfield *v.* Booth, 33 Md. 63; Lange *v.* Werk, 2 Oh. St. 519; Bowser *v.* Bliss, 7 Blackf. 344; Heichew *v.* Hamilton, 4 Greene (Iowa), 317; Hedge *v.* Lowe, 47 Iowa, 137; Smalley *v.* Greene, 52 Iowa, 241.

<sup>1</sup> Perkins *v.* Lyman, 9 Mass. 522.

<sup>2</sup> Story's Eq. Jur. § 292; citing Bryson *v.* Whitehead, 1 Sim. & St. 74; Vickery *v.* Welch, 19 Pick. 523; see Taylor *v.* Blanchard, 13 Allen, 370; Gillis *v.* Hall, 2 Brewst. 342; Keeler *v.* Taylor, 53 Penn. St. 467. An agreement by a physician, on selling his practice, not to "re-settle" in the same town, has been held not to preclude him from practising in such town after becoming resident in another town. Haldeman

*v.* Simonton, 55 Iowa, 144. As to agreement by retiring partner not to interfere see Dethlefs *v.* Tamson, 7 Daly, 354.

<sup>3</sup> Parke, B., Ward *v.* Byrne, 5 M. & W. 562; adopted in Leake 2d ed. 735, citing further Hinde *v.* Gray, 1 M. & G. 195; Allsopp *v.* Wheatcroft, L. R. 15 Eq. 59.

<sup>4</sup> Rousillon *v.* Rousillon, *supra*, § 430. In Gale *v.* Kalamazoo, 23 Mich. 344, an agreement by a city not to license more than one market was held void. A contract by which a telephone company gives preference to certain parties, is void when conflicting with a local statute. State *v.* Telephone Co., 36 Ohio St. 396.

§ 432. It is, therefore, no objection to such an agreement that it is unlimited as to time.<sup>1</sup> So far from the public interests being impaired by the substitution of the industry of one man for that of another by the sale of good-will, they are promoted, as has been noticed, by business capacity acquiring a merchantable value, just as the public interests are promoted by the alienability of other branches of labor and enterprise. It is no objection, therefore, to a sale of good-will that the party selling is permanently restrained by it from returning to do business in the community over which the good-will extends;<sup>2</sup> and if there be no limitation in such a sale as to time, the alienation will be construed to be for the vendor's life.<sup>3</sup> Yet, when the question is whether an agreement is void for the reason that it is too unlimited as to space, the fact that it is unlimited as to time is a factor to be taken into consideration.<sup>4</sup>—An assignment of a patent, it should be added, does not extend beyond the term of the patent, unless it be so expressly provided.<sup>5</sup>

No objection to such agreement that it is unlimited as to time.

§ 433. Whether a restraint is reasonable, so far as concerns space, is a question of law, to be decided in view of all the circumstances of the particular case.<sup>6</sup> It may be reasonable, in a business that permeates a community for two hundred miles from a particular site, for a manufacturer, in selling out, to agree that he will not engage in manufactures of the same line within two hundred

Reasonableness of restraint is a question of law.

<sup>1</sup> *Catt v. Tourle*, L. R. 4 Ch. Ap. 659; *Perkins v. Clay*, 54 N. H. 518.

<sup>2</sup> See *Guerand v. Dandele*, 32 Md. 561; *Hubbard v. Miller*, 27 Mich. 15.

<sup>3</sup> *Leake*, 2d ed. 736; citing *Hitchcock v. Coker*, 6 A. & E. 438; *Pemberton v. Vaughan*, 10 Q. B. 87; *Hastings v. Whitley*, 2 Ex. 611; *Elves v. Crofts*, 10 C. B. 241; *Carnes v. Nisbett*, 7 H. & N. 778.

<sup>4</sup> *Proctor v. Sargent*, 2 M. & G. 20.

<sup>5</sup> *Wetherill v. Zinc Co.*, 6 Fish. Pat. Ca. 50.

<sup>6</sup> *Catt v. Tourle*, L. R. 4 Ch. 659;

*Leather Cloth Co. v. Loursont*, L. R. 9 Eq. 349; *Perkins v. Clay*, 54 N. H. 518; *Gilman v. Dwight*, 13 Gray, 356; *Taylor v. Blanchard*, 13 Allen, 370; *Treat v. Melodeon Co.*, 35 Conn. 543; *Guerand v. Dandele*, 32 Md. 561; *Grasselli v. Lowden*, 11 Oh. St. 349; *McAlister v. Howell*, 42 Ind. 15; *Linn v. Sigsbee*, 67 Ill. 75; *Hedge v. Lowe*, 47 Iowa, 137. See remarks of Bronson, J., in *Chappel v. Brookway*, 21 Wend. 157; and see *Jones v. Heavens*, L. R. 4 Ch. D. 636.

miles.<sup>1</sup> It would not, however, be reasonable for a medical man, whose practice is ordinarily limited to a circuit of ten miles in diameter, to be bound by an agreement not to practise within one hundred miles of a particular place;<sup>2</sup> though an agreement not to practise within what is under the circumstances the ordinary bounds of practice will be sustained.<sup>3</sup> The area over which a solicitor practises is larger, and an agreement by a solicitor, selling his good-will, not to practise in London or within one hundred and fifty miles, has been held good.<sup>4</sup> A similar limitation was held good on the sale of the business of a publishing house.<sup>5</sup> The vendor of a business limited in its operation to a small neighborhood, such as may be personally visited for sale and delivery of perishable provisions, may bind himself, on selling his good-will, not to resume the business within that neighborhood, bounding it, for instance, by five miles of his old stand.<sup>6</sup> On the other

<sup>1</sup> *Harms v. Parsons*, 32 Beav. 328; see *Jones v. Lees*, 1 H. & N. 189; *Clarkson v. Edge*, 33 Beav. 227; *Oregon St. Nav. Co. v. Winsor*, 20 Wall. 64; *Morse Drill Co. v. Morse*, 103 Mass. 73.

<sup>2</sup> *Horner v. Graves*, 7 Bing. 735. See *Long v. Towl*, 42 Mo. 545; *Betts's App.*, 10 Weekly Notes, 431, where the supreme court of Pennsylvania enjoined on a radius of five miles.

<sup>3</sup> *Davis v. Mason*, 5 T. R. 118; *Sainter v. Ferguson*, 7 C. B. 716; *Mallan v. May*, 11 M. & W. 653; *Atkins v. Kinnier*, 4 Ex. 776; *Gravely v. Barnard*, L. R. 18 Eq. 518; *Perkins v. Clay*, 54 N. H. 518; *Butler v. Burleson*, 16 Vt. 176; *Pierce v. Woodward*, 6 Pick. 206; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Treat v. Melodeon Co.*, 35 Conn. 543; *Sander v. Hoffman*, 64 N. Y. 248; *Mott v. Mott*, 11 Barb. 127; *Van Marter v. Babeock*, 23 Barb. 633; *Erie R. R. v. Express Co.*, 6 Vroom, 240; *McClurg's App.*, 58 Penn. St. 51; *McNutt v. McEwen*, 1 Weekly Notes, 552; *Palmer v. Graham*, 1 Pars. 476; *Betts's App.*, *ut supra*; *Guerand v. Dandele*, 32 Md. 561; *War-*

*field v. Booth*, 33 Md. 63; *Bowser v. Bliss*, 7 Blackf. 344; *Heichew v. Hamilton*, 4 Greene (Iowa), 317; *Hubbard v. Miller*, 27 Mich. 15; *Jenkins v. Temple*, 39 Ga. 655; *Thompson v. Means*, 11 Sm. & M. 604; *More v. Bonnet*, 40 Cal. 251.

<sup>4</sup> *Bunn v. Guy*, 4 East, 190. See *Dendy v. Henderson*, 11 Ex. 194, where a limitation of twenty-one miles was held not excessive. In *Smalley v. Greene*, 52 Iowa, 241, an agreement by a lawyer not to practise in a particular town was held valid. In *Whittaker v. Howe*, 3 Beav. 383, an agreement not to practise for twenty years in any part of Great Britain was upheld.

<sup>5</sup> *Tallis v. Tallis*, 1 E. & B. 391.

<sup>6</sup> *Elves v. Crofts*, 10 C. B. 241; *Proctor v. Sargent*, 2 M. & G. 20; *Benwell v. Inns*, 24 Beav. 307; *Pierce v. Woodward*, 6 Pick. 206; *Nobles v. Bates*, 7 Cow. 307. See *Gompers v. Rochester*, 56 Penn. St. 194; *Grasselli v. Lowden*, 11 Oh. St. 349; *Holmes v. Martin*, 10 Ga., 503; *Laubenheimer v. Mann*, 17 Wis. 542.



hand, a person conducting a business which may be extended over the whole United States, may bind himself not to exercise this business within a particular state or considerable section of such state;<sup>1</sup> and in cases in which there would be breach of trust if a defendant were allowed to violate an agreement not to do business anywhere, he may be generally restrained.<sup>2</sup>—Distances, also, in such cases, are to be measured by a radius on the map, and not according to lines of travel.<sup>3</sup> But when such an agreement goes to deprive an entire state of competition in transportation, it will be held invalid; and this was held to be the case with an agreement not to run steamboats in the state of California for ten years;<sup>4</sup> though an agreement not to compete for seven years with the northwest trade has been sustained,<sup>5</sup> and so of an agreement not to run an opposition stage between Boston and Providence;<sup>6</sup> and of an agreement not to run an opposition on the Connecticut river.<sup>7</sup> An agreement of this class may be divisible; if so—as where the restriction is as to London, which was valid, or as to any place within six hundred miles of the same, which is invalid—the invalid condition may be stricken out as surplusage.<sup>8</sup>—A contract by a dealer in New Jersey not to ship poultry to New York or Washington has been held not to contain an unreasonable restriction.<sup>9</sup>

§ 434. Such an agreement must have a valuable consideration; though the courts, if the consideration be the sale of a business, or instruction in a business, will not undertake to determine whether the considera-

Must be  
valuable  
considera-  
tion.

<sup>1</sup> *Oregon N. Co. v. Winsor*, 20 Wall. 64; *Whitney v. Slayton*, 40 Me. 224; *Warren v. Jones*, 51 Me. 146. Agreements not to exercise a trade in a particular state were held void in *Taylor v. Blanchard*, 13 Allen, 370; *Laurence v. Kidder*, 10 Barb. 641; *Dunlop v. Gregory*, 6 Seld. 241. See *Catt v. Tourle*, L. R. 4 Ch. 654; *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

<sup>2</sup> *Rousillon v. Rousillon*, *supra*, § 430.

<sup>3</sup> *Mouflat v. Cole*, L. R. 8 Ex. 32.

<sup>4</sup> *Wright v. Ryder*, 36 Cal. 342.

<sup>5</sup> *Perkins v. Lyman*, 9 Mass. 522.

<sup>6</sup> *Pierce v. Fuller*, 8 Mass. 223. See *Pyle v. Thomas*, 4 Bibb, 486.

<sup>7</sup> *Palmer v. Stebbins*, 3 Pick. 188.

<sup>8</sup> *Price v. Green*, 16 M. & W. 346. See *Mallan v. May*, 11 M. & W. 653; *Oregon N. Co. v. Winsor*, 20 Wall. 64; *West. Un. Tel. Co. v. Burlington R. R.*, 11 Fed. Rep. 1; *Dean v. Emerson*, 102 Mass. 480; *Lange v. Werk*, 2 Oh. St. 520. As to divisibility, see *supra*, § 338.

<sup>9</sup> *Richardson v. Peacock*, 33 N. J. Eq. 597.

tion be adequate.<sup>1</sup> A consideration is requisite, even when the contract is under seal.<sup>2</sup> In parol contracts, the burden of proving the consideration is on the party setting up the contract.<sup>3</sup> But the consideration need not be specifically stated in the deed. It may be proved by parol.<sup>4</sup>

§ 435. A sale of good-will does not of itself imply a contract not to resume the same business in the same place,<sup>5</sup> but a party so selling out will be restrained from advertising that he has removed his former place of business to another location, in the same vicinity.<sup>6</sup>

Party may  
be enjoined  
for breach  
of trust.

The vendor of the good-will of a business, while he is entitled to carry on the business under the limitation of the contract of sale, and to solicit the continuance of custom by advertisement in the public papers, is not permitted to apply to such customers privately, or by letter, or through travellers, asking for a continuance of the patronage to him personally, even though he is not precluded from so doing by the articles of sale.<sup>7</sup> But it was held in England in 1882 that the purchaser

<sup>1</sup> *Hitchcock v. Coker*, 6 A. & E. 438; *Pilkington v. Scott*, 15 M. & W. 660; *Tallis v. Tallis*, 1 E. & B. 397, *n*; *Pierce v. Fuller*, 8 Mass. 223; *Laurence v. Kidder*, 10 Barb. 649; *McClurg's App.*, 58 Penn. St. 51; *Palmer v. Graham*, 1 Pars. 476; *Grasselli v. Lowden*, 11 Oh. St. 349; *Linn v. Sigsbee*, 67 Ill. 75. See *Jenkins v. Temples*, 39 Ga. 655. That inadequacy will not in general be inquired into, see *infra*, § 517.

<sup>2</sup> *Hutton v. Parker*, 7 Dowl. P. C. 739.

<sup>3</sup> *Ross v. Sadgbeer*, 21 Wend. 166.

<sup>4</sup> *Homer v. Ashford*, 3 Bing. 322; *Wh. on Ev.* §§ 1045, 1055.

<sup>5</sup> *Labouchere v. Dawson*, L. R. 13 Eq. 322.

<sup>6</sup> *Hall's App.*, 60 Penn. St. 458; *Palmer v. Graham*, 1 Pars. 476; *Rupp v. Over*, 3 Brewst. 133.

<sup>7</sup> *Labouchere v. Dawson*, L. R. 13 Eq. 322. This case, however, while approved by Brett, L. J., in *Walker v. Mottram*, *infra*, was dissented from by

Baggally, L. J., while Cotton and James, L. JJ., abstained in the same case at least from approving it. On the other hand, the rule was sanctioned by Lush and Lindley, L. JJ., in *Walker v. Mottram*. See observations in *London Law Times*, Feb. 11, 1882.

In *Mogford v. Courtenay*, 45 L. T. N. S. 303, it was said by Fry, J. "The rights of a late partner who has no interest in the good-will of the old business to carry on trade are somewhat refined. They amount, I think, shortly to this, that he may carry on a similar trade or similar business, but he cannot carry on the identical business; he is at liberty to do everything which flows from the right to carry on a similar business; he is prohibited or liable to be restrained from doing anything which conduces to his carrying on the identical business; but what acts come within either of those classes is a question of very considerable nicety. In the case of *Churton v. Douglas*, 33 L. T. Rep. O.

from a trustee in bankruptcy is not entitled to restrain the bankrupt, even though he joined in the assignment, from commencing *bona fide* a new business, and to seek assistance for the purpose privately, as well as otherwise, from his old customers.<sup>1</sup> It has also been held that the vendor of a business cannot be restrained, unless there be special covenant, from dealing with his old customers when they come to him.<sup>2</sup>—It was ruled in California, in 1881,<sup>3</sup> that where an employee of a firm obtained for himself a lease of a building occupied by his employers, whose term was expiring, he not notifying his employers of his intention to apply for the same, he would be enjoined from interfering with the possession of the employer. “We understand it to be the duty of the employee,” so it was said, “to devote his entire acts, so far as his acts may affect the business of his employer, to the interests and service of the employer; that he can engage in no business detrimental to the business of the employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. An agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal’s interest to his own. An agent or subagent, who uses the information he has obtained in the course of his agency as a means of buying for himself, will be compelled to convey to the principal.”—An attempt by an ex-agent to secure the business of his late principal will be enjoined as a breach of trust.<sup>4</sup>—A sale of a

S. 57; Johns. 174, the late Lord Hatherley (Wood, V. C., as he then was) came to the conclusion, which Cotton, L. J., in *Leggott v. Barrett*, 43 L. T. Rep. (N. S.) 641, considered to be in accordance with the previous decisions, that such a person might, if he thought fit, have carried on business with the customers of the old firm, provided that he did not profess to them that his was the old business, or that he was the successor in business of the old firm; but at the same time it has been determined by Lord Romilly, in the case of

*Labouchere v. Dawson*, 25 L. T. Rep. (N. S.) 894, which has received the assent of the Court of Appeal, that the person who has sold the good-will of a business ‘must not ask any customers of the old business to continue to deal with the defendant or not to deal with the purchaser.’”

<sup>1</sup> *Walker v. Mottram*, 45 L. T. N. S. 659; Law T. Jan. 7, 1882.

<sup>2</sup> *Leggott v. Barrett*, L. R. 15 Ch. D. 206.

<sup>3</sup> *Gower v. Andrew*, 13 Rep. 43.

<sup>4</sup> *Rousillon v. Rousillon*, *supra*, § 430.

right to a specific article will not be stretched to cover any article not within the description.<sup>1</sup>

§ 436. A patent right, however, is not subject to these conditions; and contracts have been validated when transferring such rights either within particular states or districts,<sup>2</sup> or absolutely without restriction as to space.<sup>3</sup> The rights, also, to an unpatented invention may be, in this way, sold, and the sale may contain a binding covenant, giving exclusive rights to the vendee without limits as to space.<sup>4</sup> Hence a stipulation in such a sale that the vendor will not disclose the process nor carry on the manufacture at any place whatsoever, is good.<sup>5</sup>

§ 437. It is not against the policy of the law that parties should bind themselves to deal, within a certain range, exclusively with each other. The law of partnership rests on a principle of this kind; and we have still more pointed illustrations in the English cases which sustain purchases of land from brewers with covenants that the purchaser, in case he opens a public house, shall buy all his beer from the vendor.<sup>6</sup> A covenant, also, by an author to write exclusively for a particular publisher, will be sustained.<sup>7</sup>—A contract, also, by which a railroad company agrees to give all

<sup>1</sup> *Garrison v. Nute*, 87 Ill. 205.

<sup>2</sup> *Printing Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Kinsman v. Parkhurst*, 18 How. U. S. 289; *Morse Drill Co. v. Morse*, 103 Mass. 73; *Stearns v. Barrett*, 1 Pick. 443.

<sup>3</sup> *Sanford v. Messer*, 1 Holmes, 149; *Dorsey Rake Co. v. Bradley*, 12 Blatch. 202; *Vickery v. Welch*, 19 Pick. 523; *Peabody v. Norfolk*, 98 Mass. 452; *Morse Drill Co. v. Morse*, 103 Mass. 73; *Gilmore v. Aiken*, 118 Mass. 94; see *Jones v. Lees*, 1 H. & N. 189; *Thomas v. Miles*, 3 Oh. St. 274; *Wilson v. Marlow*, 66 Ill. 385.

<sup>4</sup> *Hammond v. Organ Co.*, 92 U. S.

724; *Wetherill v. Zinc Co.*, 6 Fish. Pat. Cas. 50; *Peabody v. Norfolk*, 98 Mass. 452; *Gillis v. Hall*, 2 Brewst. 342; see *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351, cited *supra*, § 430; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345.

<sup>5</sup> *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Jones v. Lees*, 1 H. & N. 189; *Vickery v. Welch*, 19 Pick. 525; see *Story Eq. Jur.* 12th ed. § 292.

<sup>6</sup> *Cooper v. Twibill*, 3 Camp. 286; *Gale v. Read*, 8 East, 80; *Catt v. Tourle*, L. R. 4 Ch. 654; see *Schwalm v. Holmes*, 49 Cal. 665.

<sup>7</sup> *Morris v. Colman*, 18 Ves. 437.

its business to a ferry company, is not void as against public policy when it binds the ferry company to give all the facilities the public requires.<sup>1</sup> To validate covenants of this class, however, the commodity or services rendered should be fairly up to the market value;<sup>2</sup> and such covenants will not be extended so far as to cover agreements by employers to induce their employees to deal exclusively in a particular store.<sup>3</sup>—A contract whereby a railroad corporation grants to a telegraph company the exclusive right to put up on the railroad track a telegraph line is invalid as against public policy. A contract giving an exclusive right to a system of poles has been sustained in Illinois;<sup>4</sup> but the use of the entire roadbed cannot be thus limited. “In our opinion,” said McCrary, J., in 1882,<sup>5</sup> “it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade, and contrary to public policy. They are also in contravention of the act of congress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph ‘over and along any of the military or post roads of the United States which have been, or may hereafter be declared such by act of congress.’” The last point might be open to criticism, were it not that it is sustained by the supreme court of the United States.<sup>6</sup> The first point may be now regarded as settled. Telegraph communication is now as much a business necessity as is railway transportation; and a contract which would operate to give a monopoly to a particular telegraph company must be regarded as conflicting with public policy.<sup>7</sup>

<sup>1</sup> *Wiggins Ferry Co. v. R. R.*, 73 Mo. 39.

<sup>2</sup> *Cooper v. Twibill*, 3 Camp. 286 n; *Thornton v. Sherratt*, 8 Taunt. 529.

<sup>3</sup> *Crawford v. Wick*, 18 Oh. St. 190.

<sup>4</sup> *West. Un. Tel. Co. v. Chicago R.*, 86 Ill. 246.

<sup>5</sup> *West. Un. Tel. Co. v. Burlington R. R.*, 11 Fed. Rep. 1.

<sup>6</sup> *Pensacola Tel. Co. v. West. Un. Co.*,

96 U. S. 1; *West. Un. Tel. Co. v. Am. Union Co.*, 19 Am. Law Reg. 173.

<sup>7</sup> *Atlanta Tel. Co. v. R. R.*, 1 McCrary, 541; *West. Un. Tel. Co. v. Balt. & Oh. R. R.*, McKennan, J., 1882; *West. Un. Tel. Co. v. R. R.*, 1 McCrary, 565, 585, 597; *West. Un. Tel. Co. v. Am. Tel. Co.*, Sup. Ct. Ga. 1880; and see *supra*, § 412.

The question, then, should be, does a contract by which the exclusive use of a railroad is given to a particular company give that company such an advantage as to practically exclude all others from competition? If it does, the contract is invalid.—It has also been much discussed whether a telephone company can contract to deal exclusively with a particular telegraph company. The validity of such a contract has been affirmed in Connecticut.<sup>1</sup> On the other hand, it has been denied in Ohio, on the ground that under a statute prescribing the impartial transmission of dispatches (a similar statute existing also in Connecticut) no preference could be given by the telephone company to any particular telegraph company.<sup>2</sup>—It is implied in all contracts of service that the employee should undertake no business that makes him a competitor for the business of his employer.<sup>3</sup> In some contracts of service a pledge of this kind is expressly included, and when so included will be sustained, although it is extended to the life of the employee, provided it be limited as to space.<sup>4</sup> And when unlimited as to space, it is good if limited to the term of service of the employee,<sup>5</sup> or to a period extending so far as ten years

<sup>1</sup> American Rapid Telegraph Co. v. Telephone Co., 13 Rep. 329.

<sup>2</sup> State v. Telephone Co., 36 Oh. St. 296. In this case the court said: The American Bell Telephone Company "cannot be permitted to operate a system or line of telephones in this state, and in the face of the statute, either directly or through the agency of licenses, without impartiality; or, in other words, with discrimination against any member of the general public who is willing and ready to comply with the conditions imposed upon all other patrons or customers who are in like circumstances. . . . The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by state laws when the public welfare re-

quires it. It appears to us a proposition too plain to admit of argument that where the beneficial use of patented property, or any species of property requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the state may impose such conditions and regulations as in the judgment of the law-making power are necessary to promote the public good."

<sup>3</sup> Windscheid, § 401; Rousillon v. Rousillon, *supra*, § 430.

<sup>4</sup> Leake, 2d ed. 737; Pilkington v. Scott, 15 M. & W. 657; Hartley v. Cummings, 5 C. B. 247; Ward v. Byrne, 5 M. & W. 562; Allsopp v. Wheateroft, L. R. 15 Eq. 59. See Keeler v. Taylor, cited *supra*, § 430.

<sup>5</sup> Wallis v. Day, 2 M. & W. 273.

after the employee leaves such service.<sup>1</sup> And the fact of employment is a sufficient consideration for such an engagement.<sup>2</sup>

§ 438. It is against the policy of the law that common carriers should be relieved from all liability for negligence; and agreements so relieving them are void,<sup>3</sup> though certain special duties may be transferred from the carrier to the other contracting party, and the carrier may be by such agreements relieved from his liability as insurer.<sup>4</sup> When a valid agreement to this effect is made, the carrier, while he loses the character of an insurer, continues to be charged with liability for negligence.<sup>5</sup> Proof of such exceptions and limitations, however, to be operative, must be brought home to the party to whom they are imputed,<sup>6</sup> and this must be shown by the other party.<sup>7</sup> For

Agreements relieving from liability for negligence are void.

<sup>1</sup> *Rousillon v. Rousillon*, L. R. 14 Ch. 351; 42 L. T. N. S. 679; cited at large *supra*, § 430. In this case Fry, J., dissented from the rule laid down in *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59, that agreements unlimited as to space would not be sustained. *Rousillon v. Rousillon*, however, as has been observed, was the case of a confidential agent, binding himself not to compete, not that of a sale of good-will.

<sup>2</sup> *Gravely v. Barnard*, L. R. 18 Eq. 518; *Benwell v. Inns*, 24 Beav. 307.

<sup>3</sup> Whart. on Neg. § 589, and cases there cited; *Lawson, Cont. of Car.* 20, 22; *Gill v. R. R.*, L. R. 8 Q. B. 186. The conflicting opinions in the American courts, with the authorities, are given in Wh. on Neg. §§ 590-1-3. The subject can only be treated in outline in the text, its discussion belonging more properly to treatises on negligence.

<sup>4</sup> Wh. on Neg. § 586.

<sup>5</sup> *Ibid.* § 594.

<sup>6</sup> Wh. on Neg. § 587; see *supra*, § 22, where this topic is incidentally discussed. That notice of condition is question of fact, see *infra*, § 572. As

to presumption of reading contract, see §§ 185, 196, 205.

<sup>7</sup> *Brown v. R. R.*, 11 Cush. 97; *Buckland v. Express Co.*, 97 Mass. 124; *Gott v. Dinsmore*, 111 Mass. 45; *Gaines v. Trans. Co.*, 28 Oh. St. 418; *Pittsburgh R. R. v. Barrett*, 36 Oh. St. 449.

The following summary of the law is given by Bradley, J., *R. R. v. Lockwood*, 17 Wall. 357. "Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable

the same reason contracts have been held void when operating to relieve a combination of common carriers from the duty of using certain new improvements and facilities of travel.<sup>1</sup>—It was held in 1881 by Judge Gresham, in the United States District Court of Indiana,<sup>2</sup> that a contract between an employer and employee, by which the employee agrees to release the employer from liability for negligence of employer or fellow employees, is void.<sup>3</sup>—A similar limitation is applicable to telegraph companies. “The rule in this state is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes that degree of skill and care which a careful and prudent man would, under the circumstances, employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in performance of the service, is contrary to public policy, and consequently illegal and void. In our

articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exceptions referred to were deemed reasonable and proper to be allowed.

But the proposition to allow a public carrier to abandon altogether his obligations to the public, and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.”

A release of a railroad company from all claims for any damage “from whatsoever cause arising,” made in consideration of reduction of rates, does not exempt the company from liability for negligence. *Mynard v. R. R.*, 71 N. Y. 180. That unreasonable restrictions will not be upheld, see further *Penn. Co. v. Wentz*, 37 Oh. St. 333; *Capehart v. R. R.*, 81 N. C. 438; *Louisville R. R. v. Brownlee*, 14 Bush, 590; *Chicago etc. R. R. v. Hale*, 2 Ill. App. 150.

<sup>1</sup> *Wiggins Ferry Co. v. R. R.*, 5 Mo. Ap. 347.

<sup>2</sup> *Roesner v. Hermann*, 8 Fed. Rep. 782.

<sup>3</sup> *Western etc. R. R. Co. v. Bishop*, 50 Ga. 465.



opinion, telegraph companies fall within the operation of this rule; and in failing to exercise such care and skill in the transmission of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business, is expressly conferred by statute. But such rules must be reasonable; and if they fail to accord with the demands of a sound public policy, they are void.”<sup>1</sup>

§ 439. Not only has every man a right to a market for his

<sup>1</sup> Boynton, C. J., *West. Un. Tel. Co. v. Griswold*, Sup. Ct. Ohio, 1882, 25 Alb. L. J. 190; *White v. West. Un. Tel. Co.*, U. S. Cir. Ct. Kan. 1882, 14 Cent. L. J. 481. In *West. Un. Tel. Co. v. Neill*, Sup. Ct. Tex. 1881, we have the following:—

“In accordance with these principles, and which have been often recognized by the legislative departments also, it may now be considered as settled law, that telegraph companies can, by express contract or by proper rules and regulations contained in printed notices, or otherwise, and brought to the knowledge of those with whom they deal, under such circumstances as to create an implied contract, limit their liability for delays and errors in transmitting and delivering messages, except when caused by the misconduct, fraud, or want of due care on the part of the company, its servants or agents.

“In cases of this character, that exemption from liability cannot be claimed for such misconduct, fraud, or want of due care, is a cardinal doctrine of the common law which has become deeply rooted into our own jurisprudence, and the wisdom of which has received the sanction of ages. 2 Sedg. on Dam. (7th ed.) 130; 2 Redf. on Railw. (4th ed.) 290; 2 Thomp. on

Neg. 839, § 4; *West. Un. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. Tel. Co.*, 13 Allen, 226; *Birney v. Tel. Co.*, 18 Md. 358; *U. S. Tel. Co. v. Gildersleeve*, 29 id. 232; *Breese v. Tel. Co.*, 45 Barb. 274; reaffirmed, 48 N. Y. 132; *Camp v. Tel. Co.*, 1 Metc. (Ky.) 164; *Passmore v. Tel. Co.*, 78 Penn. St. 238; *Aiken v. Tel. Co.*, 5 S. C. 358.” S. P., *West. Un. Tel. Co. v. Blanchard*, 66 Ga. A limitation of liability on half-rate night messages to ten times the amount paid for the message was held in this case reasonable; and the court went on to say:—

“Another regulation of telegraph companies held to be reasonable by the great weight of authority is the right to demand, in a proper case, as a condition of liability, that the message be repeated at a reasonable cost. 2 Sedg. on Dam. (7th ed.) 130; 2 Redf. Railw. 290, § 17, note 15; 2 Thomp. on Neg. 841, § 6; *West. Un. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. Tel. Co.*, 13 Allen, 226; *Redpath v. Tel. Co.*, 112 Mass. 71; *Grinnell v. Tel. Co.*, 113 id. 299; *Wann v. Tel. Co.*, 37 Mo. 472; *Breese v. Tel. Co.*, 45 Barb. 274; reaffirmed, 48 N. Y. 132; *Camp v. Tel. Co.*, 1 Metc. (Ky.) 164; *Passmore v. Tel. Co.*, 78 Penn. St. 238; *MacAndrew v. Tel. Co.*, 17 C. B. 3; S. C., 33 Eng. L. & Eq. 180.”

labor of which he cannot absolutely divest himself, but the community has a right to obtain labor, as it would obtain any other commodity, at the price at which it would be fixed under the ordinary laws of supply and demand. Hence, combinations to monopolize the labor of a community by refusal of the parties combining to do work except at a fixed price, have been held, when undue influence is used to prevent others from laboring at a lower price, or a labor-famine is thereby induced, indictable as conspiracies at common law. But to constitute such illegality, the use of undue influence, amounting to either force or fraud, must be part of the agreement, or the agreement must amount to an entire absorption of the particular kind of labor, so as to establish virtual duress. "I cannot bring myself to believe," said Lord Campbell,<sup>1</sup> "without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence, or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment. *The object is not illegal*, and therefore, if no illegal means are to be used, there is no indictable conspiracy." If the object is not illegal, then an agreement otherwise valid does not become invalid because this ingredient enters into its composition. But the presence of either of the above qualifications makes the agreement invalid. (1) We must, therefore, predicate this invalidity of an agreement to keep other operatives out of employment by threats or fraud.<sup>2</sup> (2) And we must further hold, that when the object is to monopolize all the labor of a particular community, then, like all other attempts to monopolize for extortionate purposes a necessary staple, the agreement is to obtain an advantage by duress, and will not, therefore, be enforced.<sup>3</sup> The duress is analogous to that already

Agree-  
ments lim-  
iting the  
price of  
labor void.

<sup>1</sup> *Hilton v. Eckersley*, 6 E. & B. 62. 196; Wh. Cr. L. 8th ed. § 1366; 1 Bl.   
<sup>2</sup> *R. v. Hewitt*, 5 Cox, C. C. 162; R. Cóm. 158; *R. v. Webb*, 14 East, 406;   
*Rowlands*, 5 Cox, C. C. 436; 17 Q. R. v. Waddington, 1 East, 143; *People v. Fisher*, 14 Wend. 9.

<sup>3</sup> 1 Hawk. P. C. c. 80, s. 3; 3 Inst.

noticed in cases where money paid by a party to one refusing otherwise to deliver goods, has been recovered back.<sup>1</sup> It is as much against the policy of the law to absorb all the labor in the community, so as to compel employers to pay extortionate prices, as to buy up the necessities of life, so as to obtain extortionate prices, or to hold back goods from their owner until an extortionate bonus is paid for them.

§ 440. For the reason that the right to labor is inalienable, a party who agrees (unless for a specific consideration in reference to a particular place) not to labor except for a specific price, is not bound by his agreement.<sup>2</sup> Agreements, also, not to work for a particular obnoxious individual, so as to preclude him from procuring labor, are invalid.<sup>3</sup>

Agreements not to labor except at a certain price or for a particular person are invalid.

§ 441. On the same ground, an agreement of all employers of labor in a particular line limiting themselves in the hiring of labor for a particular time, is void, the right to employ as well as the right to be employed being inalienable.<sup>4</sup> And, aside from this ground, such an agreement amounts to duress which invalidates contracts based upon it. A laborer is entitled to a market for his labor. For all employers to unite to exclude him, except on extortionate concessions, from employment necessary to sustain life, is to apply to him a duress which invalidates the concessions thus extorted. The question is whether such a duress is actually applied. It certainly is not when a group of employers agree to reduce wages to a figure proportioned to their temporary receipts. It certainly is when all the employers of a community agree to reduce wages unreasonably, leaving to the operative the choice only between submission and starvation.

And so of combination of employers.

§ 442. Whenever a particular staple is essential to the health and comfort of the community, a combination to absorb it for the purposes of extortion is invalid. This is the case in respect to a combination to absorb all of a particular kind of necessary food;<sup>5</sup>

Agreements to absorb a staple or fix prices invalid.

<sup>1</sup> See *supra*, § 149; *infra*, § 738.

<sup>2</sup> *Collins v. Locke*, L. R. 4 Ap. Ca.

<sup>3</sup> *Leake*, 2d ed. 741, citing *Farrer v.* 674.

*Close*, L. R. 4 Q. B. 612; *Springhead*

<sup>4</sup> *Hilton v. Eckersley*, 6 E. & B. 66.

*Spinning Co. v. Riley*, L. R. 6 Eq. 551.

<sup>5</sup> 1 *Hawk. P. C. c.* 80, s. 3; 1 *Bl.*

and a combination to absorb all coal procurable in the market.<sup>1</sup> But a combination between a coal company and a carrying company by which the latter grants to the former half of its capacity, is not of itself invalid.<sup>2</sup> On the other hand, an

Com. 150; *R. v. Waddington*, 1 East, 143 (a combination to force up price of hops); *Craft v. McConoughy*, 79 Ill. 346; *Raymond v. Leavitt*, Sup. Ct. Michigan, 1881 (a combination to force up price of wheat).

<sup>1</sup> *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173; *Arnot v. Coal Co.*, 68 N. Y. 558. *Crawford v. Wick*, 18 Oh. St. 190, held invalid an agreement between the lessor and the lessee of a coal mine, by which the latter was to use his influence over his employees in favor of the former's store, and by which the lessee was neither to give nor accept an order on any other store.

<sup>2</sup> *Com. v. Del. & Hudson Canal Co.*, 43 Penn. St. 295. See *Del. & Hudson Canal Co. v. Penn. Coal Co.*, 21 Penn. St. 131.

In *Collins v. Locke*, L. R. 4 Ap. Ca. 674; 28 W. R. 189, an agreement was set up between the stevedores of the port of Melbourne distributing the business of the port among themselves, and providing that if any merchant refused to give his business to the stevedore designated in the agreement, the party doing the work should give an equivalent, to be fixed by arbitrators, to the party superseded. The agreement was held not invalid.

In *Raymond v. Leavitt*, *ut supra*, *Campbell, J.*, said: "The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or

use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal. But it is enough to make them so questionable that very little further is required to bring them within distinct prohibition. The cases of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, and *Arnot v. Coal Co.*, 68 N. Y. 558, held contracts involving similar dealings with coal, to be against public policy. And we think the reasoning of those cases is based on familiar common law principles, which apply more strongly to provisions than to any other articles.

"There is no doubt that modern ideas of trade have practically abrogated some common law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our states have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was con-

agreement to create a corner in stock, so as to control a market, and then, when the fact of this absorption is unknown, to make purchases for future delivery, is void.<sup>1</sup> It is held, also, that an agreement by an association of salt manufacturers that no member should sell salt for a specific term below prices to be fixed by a committee is invalid, as in restraint of trade;<sup>2</sup> and so of an agreement by several business houses not to sell cotton bagging for three months, except with the consent of a majority of their number.<sup>3</sup>—"All restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of parties in dealing legally with some subject-matter of contract."<sup>4</sup> "We must wilfully shut our eyes, before we can fail to see that a combination between a man who furnishes money, and dealers who manipulate the market

sidered that enough remained of the common law to punish combinations to enhance the value of commodities. . . .

"We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common law offences, is referred to in the case in 68 N. Y. as rendering such conspiracies unlawful, and this had been previously held in *People v. Fisher*, 14 Wend. 9, where the subject is discussed at length. There may be difficulties in determining conduct as in violation of public policy, where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot sustain the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the legislature, if attention were called to them, would not legalize

them. We do not think public opinion has become so thoroughly demoralized; and until the law is changed we shall decline enforcing such contracts. If parties see fit to invest money in such ventures, they must get it back by other than legal measures."

"When such contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed on and the market price at some future day, they come within the statute of gambling, and are void in law." *Per cur.* *Barnard v. Backhaus*, 52 Wis. 597.

<sup>1</sup> *Sampson v. Shaw*, 101 Mass. 145, and cases cited *infra*, § 453. As to Illinois statute against "options" and "corners," see *Tenney v. Foote*, 4 Ill. Ap. 594; *Williams v. Tiedemann*, 6 Mo. Ap. 269. As to "corners," see § 453 *b*.

<sup>2</sup> *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

<sup>3</sup> *India Bagging Ass. v. Knox*, 14 La. An. 168; see *Gulick v. Ward*, 5 Halst. 87.

<sup>4</sup> *Bramwell, B., Jones v. Lees*, 1 H. & N. 189.

where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worse kind of produce gambling, and it is impossible for any but dangerous results to come from it."<sup>1</sup>

§ 442a. An agreement between all carriers and transportation companies of a particular section for the purpose of absorbing or crushing all competition, and fixing on the community arbitrary and unreasonable prices of transportation, will be held void as against the policy of the law.<sup>2</sup> In determining questions of policy of this class two opposite dangers are to be avoided. On the one side to declare all combinations and absorptions by carriers illegal would be to inflict a serious blow, not only on the carrying interests, but on the interests of those desiring carriage. If it were illegal for railroad companies to agree to fix upon remunerative rates, then, each company caring for

<sup>1</sup> Campbell, J., *Raymond v. Leavitt*, *ut supra*. See Story Eq. Jur. §§ 292 *et seq.*

<sup>2</sup> *Oregon St. Nav. Co. v. Winsor*, 20 Wall. 64; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Maguire v. Smock*, 42 Ind. 1; Transportation cases reported Wh. Precedents, No. 658, and discussed in an article in the *Criminal Law Mag.* for Jan. 1842, p. 8. In these cases, which were prosecutions instituted in Pittsburgh in 1842, a *habeas corpus* was taken out before Judge Grier, then sitting as president of the Pittsburgh District Court. It appeared in evidence that the defendants, being "engaged in the business of carriers and transporters of merchandise on the Pennsylvania canal," made an agreement, which they swore to observe, requiring a return of freight received, under oath, "and, in the event of any line being out of freight, a fund to be formed, by the payment of seven per

cent. on all freights, to be divided into nine shares, and each line to draw one-ninth without regard to the amount to be put in by said line." A minimum rate of freight was fixed. Each member attending the stated meeting was required to present an affidavit that he had observed the rules, though the option of withdrawing from the association on two weeks' notice was reserved. Of this combination, Judge Grier said: "It is nothing less than a combination between the chief capitalists and carriers on this line of our public works to raise or depress the rate of freight, as it may suit their own interests, either to increase their profits or crush a competitor." See opinion in full Wh. Prec. No. 658. The defendants were remanded for trial, and were convicted before Judge Patten in the Quarter Sessions, June T. 1842, No. 37. They were pardoned after a few days' imprisonment.

itself, a reckless and bankrupt corporation, whose object is to snatch at whatever it can and pay out nothing that it can help, would be able to inflict sometimes ruinous loss on its competitors, and permanently damage transportation, by charging non-remunerative rates. It is likely, also, that the country will be far better served, and customers be encouraged to far larger shipments, if it is understood that prices between the chief centres of trade are equitably and permanently fixed by agreement between the great competing carriers, and are not liable to fluctuate as the momentary temper of any one of these carriers may dictate. On the other side, it would be intolerable if all the carriers between any of our great centres were to be permitted to combine to charge extortionate rates. It is as much against the policy of the law that such a combination should be permitted as it is against the policy of the law that a combination to absorb all the necessary staples of a community should be permitted.<sup>1</sup> The line to be taken is analogous to that to be drawn in respect to the absorption of staples. On the one side, combinations of carriers to enforce uniformity and constancy of reasonable rates are consistent with the policy of the law. On the other side, combinations to absorb all the possible carrying interests between specific centres into a general direction, and for the purpose of imposing unreasonable rates, are void as against the policy of the law.<sup>2</sup>

<sup>1</sup> *Supra*, § 442.

<sup>2</sup> Special contracts by carriers with special customers by which such customers are peculiarly favored, the object being to supersede a competing carrier, are not void as against the policy of the law. *Fitchburg R. R. v. Gage*, 12 Gray, 399; *Hersh v. R. R.*, 74 Penn. St. 181; *Munhall v. R. R.*, 92 Penn. St. 150. "The cause of complaint," said the court in *Munhall v. R. R.*, "is that the Alleghany Valley Railroad Company entered into an arrangement with the Pennsylvania Railroad Company, the effect of which was to take from the plaintiffs that

transportation of oil which they would otherwise have obtained. It is not complained that the price of freight from Pittsburgh east was increased by this arrangement, nor that the public in any manner suffered thereby. Each party had an undoubted right to enter into a just and fair arrangement with a corporation or association of men whereby its business should be increased, although the effect of this arrangement may have been to take business from the other." In reference to English pooling contracts, see *Brice's Ultra Vires*, 2d Am. ed. 419; *Shrewsbury R. R. v. London, etc., R.*

§ 443. An agreement by parties capable of influencing a sale by auction to suppress competition at such sale is void, and as between the parties will not be enforced.<sup>1</sup> Hence a sheriff's sale was set aside where

Agreement  
to suppress  
bids at auc-

- R., 20 L. J. Ch. 90, 102; 17 Q. B. 652; 2 MacN. & G. 324; 4 De G. M. & G. 115. In *Charlton v. R. R.*, 5 Jur. N. S. 1097, it was said by Sir W. P. Wood, V.-C., that "an agreement that the profits and loss (of two roads) shall be brought into one common fund, and the net receipts divided, without the authority of an act of parliament, appears to me so clearly and palpably illegal, that I do not think the court ought to hesitate in its views in that respect; otherwise it might be that all the railways in the kingdom might be collected in one large joint-stock concern." The question of public policy was waived. As holding that such consolidations cannot be sustained, see *Central R. R. v. Collins*, 40 Ga. 582. But while a consolidation was thus held *ultra vires*, it is otherwise as to an agreement between two competing roads to divide traffic on a reasonable basis, and equity will not enjoin such an arrangement. "When," said Sir W. P. Wood, "in an application for an injunction in a case of this class (*Hare v. R. R.*, 2 Johns. & H. 80), in the judgment of the directors and of the company assembled in general meeting, it is found advantageous to give up certain contingent profits in order to secure certain other profits expected from the arrangement, an individual shareholder does not seem to have any right to treat such a contract as an injury to himself."

In *Stanton v. Allen*, 5 Denio, 434, a combination of all the leading proprietors of boats on the New York canals to fix rates, suppress competition, and pool profits was held invalid;

and, though this conclusion in part rested on the New York statute that, "if two or more persons shall conspire to commit any act injurious to trade or commerce, they shall be deemed guilty of a misdemeanor," it is sustained also on common law reasoning. See *Marsh v. Russell*, 66 N. Y. 288; *Clancey v. Salt Co.*, 62 Barb. 395; *Hartford R. R. v. N. Y. R. R.*, 3 Robt. 411. That pooling when it destroys competition among carriers is against the policy of the law, see further *Currier v. R. R.*, 48 N. H. 321; *State v. R. R.*, 29 Conn. 538; *Peoria R. R. v. Coal Co.*, 68 Ill. 489; *Stewart v. Trans. Co.*, 17 Minn. 372, cited in an article on this topic in 10 West. Jurist, 336.

<sup>1</sup> *Supra*, § 268; *Levi v. Levi*, 6 C. & P. 239; *Cocks v. Izard*, 7 Wal. 559; *Toler v. Armstrong*, 4 Wash. C. C. 297; 11 Wheat. 258; *Gardiner v. Morse*, 25 Mr. 140; *Phippen v. Stickney*, 3 Met. 387; *Thompson v. Davis*, 13 Johns. 112; *Troup v. Wood*, 4 Johns. Ch. 228; *Brisbane v. Adams*, 3 N. Y. 129; *Atcheson v. Mallon*, 43 N. Y. 147; *Wheeler v. Wheeler*, 5 Lans. 355; *Bank of the Metropolis v. Sprague*, 5 C. E. Greene, 159; *Slingluff v. Eckel*, 24 Penn. St. 472; *Wood v. Hudson*, 5 Munf. 423; *Ray v. Mackin*, 100 Ill. 246; *Hannah v. Fife*, 27 Mich. 172; *Ingram v. Ingram*, 4 Jones N. C. 188; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Wooton v. Hinkle*, 20 Mo. 290; *Hook v. Turner*, 22 Mo. 333; *Turner v. Adams*, 46 Mo. 95; *James v. Fulcrod*, 5 Tex. 512; *Jenkins v. Frink*, 30 Cal. 586. As to auction sales in general, see *supra*, § 25 b; as to puffers, *supra*, § 167.



it appeared that the purchaser had deterred others from bidding by claiming that he was bidding as the representative of the family;<sup>1</sup> though fraud in such cases must be substantively proved.<sup>2</sup> For the same reason the courts have held invalid an agreement to suppress competition in bidding in answer to proposals for a public work;<sup>3</sup> and hence a combination of contractors, by which the privilege of bidding is secured by one, the others to share the profits, is in conflict with the policy of the law, and a letting on unreasonable terms thus induced will be held inoperative.<sup>4</sup> But when parties cannot singly purchase a property at public sale, or are partners in a public enterprise in which they cannot sever, or desire to make a purchase larger than individual bidders could ordinarily afford, an agreement between them to combine to make a purchase has nothing in it unlawful.<sup>5</sup> "The mere fact that an arrangement, fairly entered into, with honest motives, for the preservation of existing rights and property, may incidentally restrict competition at a public or judicial sale, does not, we think, make the arrangement illegal."<sup>6</sup>

tions and public proposals are void.

§ 444. Whether an agreement between parties not to bid for a particular article but to make a lumping tender is illegal, depends upon whether the tendency of the agreement is to suppress competition. Supposing that other parties are not in this way deterred from

Agreement not to compete but make joint tender not invalid.

<sup>1</sup> *Walter v. Gernant*, 13 Penn. St. 15; *Sharp v. Long*, 28 Penn. St. 433.

<sup>2</sup> *Dick v. Cooper*, 24 Penn. St. 217; *Abbey v. Dewey*, 25 Penn. St. 413.

<sup>3</sup> *Atcheson v. Mallon*, 43 N. Y. 147.

<sup>4</sup> *People v. Stephens*, 71 N. Y. 527. An agreement by which a competitor for a public contract agrees to withdraw his bid, and to aid in securing the contract for his rival, is void as against public policy when to be effected by underhand means. *Ray v. Mackin*, 100 Ill. 246.

<sup>5</sup> *Kearney v. Taylor*, 15 How. U. S. 519; *Gardner v. Morse*, 25 Me. 140;

*Bellows v. Russell*, 20 N. H. 427; *Phippen v. Stickney*, 3 Met. 387; *Bk. of the Metropolis v. Sprague*, 5 C. E. Gr. 159; *Smull v. Jones*, 1 Watts & S. 128; 6 Watts & S. 122; *Dick v. Cooper*, 24 Penn. St. 217; *Breslin v. Brown*, 24 Oh. St. 565; *Switzer v. Skiles*, 3 Gilm. 529; *Smith v. Greenlee*, 2 Dev. 126; *Goode v. Hawkins*, 2 Dev. Eq. 393; and cases cited in *Wald's Pollock*, 310.

<sup>6</sup> *Andrews, J., Marie v. Garrison*, 83 N. Y. 28, citing *Wicker v. Hoppock*, 6 Wall. 94; *Phippen v. Stickney*, 3 Met. 384; *Marsh v. Russell*, 66 N. Y. 288.

coming forward, there is no more reason why an article should not be bought by six persons than that it should not be bought by one person.<sup>1</sup>

§ 445. As analogous to the rulings above given refusing to give effect to contracts in restraint of trade may be regarded the much contested English and American decisions refusing to declare invalid contracts for trade made illicit by foreign revenue laws.<sup>2</sup> "Smuggling," says Goldwin Smith,<sup>3</sup> "is the irregular protest of nature against an artificial line;" and to work into all trading contracts the revenue laws of all states from whose dominion the goods contracted for should proceed, would expose such contracts to a distressing uncertainty, and greatly limit the freedom of international trade, as well as sanction what may be great wrongs. Hence, we have numerous rulings in England and the United States, that contracts will not be declared void simply because they conflict with a foreign revenue law.<sup>4</sup> It is true that high authorities unite in condemning this conclusion;<sup>5</sup> but it is nevertheless now regarded as settled law.<sup>6</sup>

Foreign  
revenue  
laws will  
not be  
enforced.

<sup>1</sup> Jones *v.* North, 19 Eq. 426; Kearney *v.* Taylor, 15 How. 494; Huntingdon *v.* Bardwell, 46 N. H. 492; Smull *v.* Jones, 1 Watts & S. 128; 6 W. & S. 122; Breslin *v.* Brown, 24 Oh. St. 565; see Bradley *v.* Coolbaugh, 91 Ill. 148, and other cases cited in last section and in Wald's Pollock, 310. That an agreement to pay off other proposers for contracts is void, see Wald *v.* Lancaster, 56 Me. 453; Stevens *v.* Perrier, 12 Kan. 297.

<sup>2</sup> Wh. Con. of L. § 484.

<sup>3</sup> Cotem. Rev. Sept. 1881. Swift, in a letter to Motte, the London printer, speaking of the English statutes restricting the woollen trade, said: "I am so incensed against the oppressions from England, and have so little regard to the laws they make, that I do, as a clergyman, encourage the merchants (of Ireland) both to export wool and woollen manufactures to any country in Europe, or anywhere else,

as I would hide my purse from a highwayman if he came to rob me on the road, although England has made a law to the contrary."

<sup>4</sup> Briggs *v.* Lawrence, 3 T. R. 454; Clugas *v.* Penaluna, 4 T. R. 466; Planché *v.* Fletcher, Doug. 251; Lightfoot *v.* Tenant, 1 B. & P. 551; Sortwell *v.* Hughes, 1 Curtis, 244; Harris *v.* Runnells, 12 How. U. S. 79; Smith *v.* Godfrey, 28 N. H. 379; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Merchants' Bank *v.* Spalding, 5 Selden, 53; Kohn *v.* Schooner Renaissance, 5 La. An. 25; Ivey *v.* Lalland, 42 Miss. 444; Armendraz *v.* Serna, 40 Tex. 291; see Hill *v.* Spear, 50 N. H. 273.

<sup>5</sup> See citations in Wh. on Con. of L. § 484; Pollock, 3d ed. 299; Story, Conf. of Laws, § 257; Story, Cont. § 720.

<sup>6</sup> In Sharp *v.* Taylor, 2 Phill. 801, there were intimations that English courts would not regard foreign regis-

§ 446. An action for the price of goods to be smuggled into England cannot be maintained in the English courts; even though the plaintiff, a domiciled Englishman, was, at the time of the contract, living in a foreign land in which the contract was made;<sup>1</sup> nor can a foreign vendor recover if he combined to defeat the English revenue laws by intentionally packing the goods in a way fitting them to be smuggled.<sup>2</sup> But the mere fact that a foreign vendor knew that the purchaser was arranging to evade the English tariff does not preclude the vendor from recovering in an English court.<sup>3</sup> When, on the other hand, the object is to violate the home revenue law, this vitiates a contract for the purpose of effecting such object.<sup>4</sup>

Intended evasion of home revenue laws does not vitiate contract when this is not the consideration.

tration laws as affecting contracts to be acted on in England; but the question was not actually determined. But in our own courts a contract founded on a consideration in violation of our own navigation laws will not be enforced. *Maybin v. Coulson*, 4 Dall. 298; 4 Yeates, 24.

<sup>1</sup> *Clugas v. Panaluna*, 4 T. R. 466.

<sup>2</sup> *Waymell v. Reed*, 5 T. R. 599; *Leake*, 2d ed. 782. That there can be no action generally for the price of smuggled goods, see *Condon v. Walker*, 1 Yeates, 483.

<sup>3</sup> *Supra*, § 393; *Holman v. Johnson*, Cowp. 341; *Pellecat v. Angell*, 2 C. M. & R. 311.

<sup>4</sup> *Drexler v. Tyrrell*, 15 Nev. 115. In *Patrick v. Littell*, 36 Oh. St. 79, a loan of money was to be secured by a conveyance of real estate in fee to the lender, with a lease back for a specified number of years, with a privilege of redemption to the lessees at the expiration of the term, the lessees to pay a ground rent equal to eight per cent. per annum on the money loaned. It was held that such security is in equity a mortgage and subject to taxation under the statute, and that a promise to a third

party to pay for services to be rendered in obtaining a loan to be thus secured, is not void as contrary to public policy, although the object of the lender of the money in adopting such form of security was to evade taxation upon the investment. *Boynton, J.*, said: "As respects this objection, whatever might be the effect of the transaction, if the person from whom the money had been procured were seeking to enforce the provisions of the agreement,—with which point we are not now concerned,—the relation of the defendants in error to the transaction, or to the form of the security to be given for the money borrowed, was not such, in our judgment, as to defeat their right to compensation for the services rendered, or the money advanced. They were constituted agents to procure a loan, upon terms prescribed by the plaintiff and her husband. The written request to procure the same explicitly defined the form of the security the defendants were directed to adopt. It was in pursuance of these directions that the services were rendered and the money paid for the examination of the title to the

## X. WAGERS AND GAMBLING.

§ 449. At common law a contract on a wager, by which A. agrees to pay money to B. conditioned on a certain fact transpiring, in consideration of B. paying money to A. conditioned on the same fact not transpiring, is valid, provided the fact which is the subject of the wager be not one which it is against the policy of the law either to have investigated or to have made dependent upon such influences as a wager would be likely to put in motion.<sup>1</sup> The courts have, therefore, refused to sustain wagers whether an unmarried woman had a child;<sup>2</sup> whether a person is of a particular sex;<sup>3</sup> whether a certain person has committed adultery;<sup>4</sup> and whether certain

Wagers on matters which ought not to be investigated are illegal.

property, which was to be pledged as security for the debt. The agreement by the defendants was fully executed, and the services rendered were performed in good faith. To refuse them redress, under the circumstances, for the reason stated, would, it seems to us, be applying the doctrine which denies a remedy for the enforcement of contracts contrary to public policy, to a state of facts not justly falling within the operation of the rule. The services they performed were distinctive in their character and perfectly lawful; and, had the transaction been executed throughout in the mode contemplated by the parties as respects the form of the security to be taken, it would, in fact and legal effect, have been but a loan secured by what in equity would have been regarded as a mortgage only, and the investment, without doubt, have been as much the subject of taxation, under the statute relating to that subject, as if a mortgage pure and simple had been taken. Where the transaction, within the understanding of the parties, is a loan of money upon security, no form which the transaction may assume can so

disguise it as to change its legal character or effect."

<sup>1</sup> In *Hampden v. Walsh*, L. R. 1 Q. B. D. 192, a wager is defined to be "a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening." This is defective as excluding cases where the wager is based on an existing fact not yet ascertained. That a wager is not at common law unlawful, see *Leake*, 2d ed. 748; *Benj. on Sales*, 3d Am. ed. § 542; *Good v. Elliott*, 2 T. R. 693; *Hussey v. Crickett*, 3 Camp. 168; *Cousins v. Nantes*, 3 Taunt. 515; *Hampden v. Walsh*, *ut supra*; *Grant v. Hamilton*, 3 McL. 100; *Bunn v. Riker*, 4 Johns. 426; *Haskett v. Wooten*, 1 Nott & McC. 180; *Dunman v. Strother*, 1 Tex. 89. That an agreement is none the less a wager because the wagering element is put in the shape of a conditional sale of goods or contract for wages, see *Higginson v. Simpson*, L. R. 2 C. P. D. 76.

<sup>2</sup> *Ditchburn v. Goldsmith*, 4 Camp. 152.

<sup>3</sup> *Da Costa v. Jones*, Cowp. 729.

<sup>4</sup> See *Atherfold v. Beard*, 2 T. R. 610; *Hartley v. Rice*, 10 East, 22.

domestic relations existed which could not be explored without giving great personal pain or public scandal.<sup>1</sup>

§ 450. A wager, also, will not be sustained when the thing to which the wager relates is one which it is against the policy of the law to have thus acted on. This has been held to be the case with a wager between two voters as to the result of an election, which it is against the policy of the law to have made dependent upon pecuniary gain;<sup>2</sup> with a wager, that a person indicted would be convicted on a coming trial;<sup>3</sup> with a wager by a party that he would not marry within six months, this being in restraint of marriage;<sup>4</sup> with wagers as to the result of illegal games.<sup>5</sup>

And so of wagers as to matters which it is against the policy of the law to have thus acted upon.

§ 451. By the act of 8 and 9 Vict. c. 109, s. 18, it is enacted "that all contracts or agreements, whether in parol or in writing, by way of gaming and wagering shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."<sup>6</sup> Under this statute, notes given in payment of money won by wagering are held not to be illegal in their inception, but simply null and void so far as concerns their consideration, and

By statute wagers are illegal.

<sup>1</sup> *Eltham v. Kingsman*, 1 B. & Al. 684; *Shirley v. Sankey*, 2 Bos. & P. 130.

<sup>2</sup> *Allen v. Hearn*, 1 T. R. 56; *Atwood v. Weeden*, 12 R. I. 293; *Ball v. Gilbert*, 12 Met. 397; *Bunn v. Riker*, 4 Johns. 426; *Rust v. Gott*, 9 Cow. 169; *Brush v. Keeler*, 5 Wend. 250; *Wagonseller v. Snyder*, 7 Watts, 343; *Machir v. Moore*, 2 Grat. 257; *Foreman v. Hendwick*, 10 Ala. 316; see

*Thomas v. Cronise*, 16 Ohio, 54; but see *Shaw v. Gardner*, 30 Iowa, 111. As to the right to recover back money deposited by mistake with stakeholder; *infra*, §§ 454, 729.

<sup>3</sup> *Evans v. Jones*, 5 M. & W. 77.

<sup>4</sup> *Hartly v. Rice*, 10 East, 22.

<sup>5</sup> *Egerton v. Furseman*, 1 C. & P. 613; *Kennedy v. Gad*, 3 C. & P. 376.

<sup>6</sup> *Leake*, 2d ed. 750.

consequently may be sued on by *bona fide* holders.<sup>1</sup> It has been also held, under the statute, that if money won by wagering be paid to an agent of the winner, the agent must pay it over.<sup>2</sup> Nor does the statute, so it has been held, preclude a person from recovering his deposit, on repudiating the wager, before the money has been actually paid over.<sup>3</sup>

§ 452. The tendency in the United States has been to hold that the English statutes prohibiting wagers are simply expressive of the common law, and that all contracts, of which the consideration is a wager, are in themselves invalid. It was ruled, for instance, at an early period in Pennsylvania, that although the statute of 19 Geo. II. c. 37, was not in force in that state, yet its principle was virtually accepted as part of the law.<sup>4</sup> And the general tendency in this country is to hold that wagering contracts, in a matter in which the parties have no business interest, are in any shape illegal.<sup>5</sup> Money staked on

In this country tendency is to hold all wagers illegal.

<sup>1</sup> *Fitch v. Jones*, 5 E. & B. 238.

<sup>2</sup> *Johnson v. Lansley*, 12 C. B. 468.

<sup>3</sup> *Leake*, 2d ed. 750; *Varney v. Hickman*, 5 C. B. 271; *Hampden v. Walsh*, L. R. 1 Q. B. D. 189; see *supra*, § 354; *infra*, §§ 452, 729. As to the construction of the proviso, see *Batty v. Marriott*, 5 C. B. 818, overruled in *Diggle v. Higgs*, L. R. 2 Ex. D. 422; *Batson v. Newman*, L. R. 1 C. P. D. 573; *Coombes v. Dibble*, L. R. 1 Ex. 248. As to American statutes, see *Edgell v. McLaughlin*, 6 Whart. 176; *Sutphin v. Crozer*, 1 Vroom, 257. As to construction of statute generally, see *Moon v. Durden*, 2 Ex. 22; *Higginson v. Simpson*, L. R. 2 C. P. D. 76. In *Ramloll Thackoorseydass v. Soojumnull Dhondmull*, 6 Moo. P. C. 310, where it was held that in India, to which the act of 8 & 9 Vict. does not apply, a wager on the price of opium at the next government sale is not illegal, Lord Campbell said: "I regret to say that we are bound to consider the common law of England to be that an action can be maintained on a

wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost shame on the subterfuges and contrivances and evasions to which the judges in England long resorted in struggling against this rule." But as Mr. Pollock (3d ed. 290) well remarks, "it may surely be thought at least doubtful whether decisions so produced and so reflected upon can in our own time be entitled to any regard at all."

<sup>4</sup> *Pritchett v. Ins. Co.*, 3 Yeates, 458.

<sup>5</sup> *Lewis v. Littlefield*, 15 Me. 233; *Perkins v. Eaton*, 3 N. H. 152; *Collamer v. Day*, 2 Vt. 144; *Ball v. Gilbert*, 12 Met. 399; *Sampson v. Shaw*, 101 Mass. 150; *Edgell v. Laughlin*, 6 Whart. 176; *Phillips v. Ives*, 1 Rawle, 36; *Lloyd v. Leisenring*, 7 Watts, 294; *Fahnestock v. Clark*, 24 Penn. St. 501 (a wager to try the right of a public

a horserace can, in Pennsylvania, be recovered by the loser from either the winner or a stakeholder.<sup>1</sup> In Vermont and Massachusetts, where the money is demanded of the stakeholder before it is paid over, it can be recovered, or it can be recovered from the winner if the money has been received by him.<sup>2</sup> In New York there can be a recovery from the stakeholder even after he has paid over to the winner.<sup>3</sup> A distinction, also, under the statute, is to be taken between a premium on speed and betting on stakes; the former of which may be legal and the latter illegal.<sup>4</sup> "Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity."<sup>5</sup> It is otherwise with racing for a purse or premium, which "is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife of which he does not enter."<sup>6</sup>

§ 453. A contract to purchase shares of stock or other chattels, as a mere speculation, without any intention of receiving and holding them, is void as a gambling transaction under the English statute.<sup>7</sup> In this

A contract to purchase stocks or other chattels with-

officer); *Thomas v. Cronise*, 16 Ohio, 54; *Hasket v. Wooton*, 1 Nott & McC. 180; *Rice v. Gist*, 1 Strobb. 82; *Martin v. Torrill*, 12 Sm. & M. 571; *Carrier v. Brannon*, 3 Cal. 328. A note payable "on the election of R. B. Hayes to the office of president" is void as against public policy. *Lockhart v. Hullinger*, 2 Ill. Ap. 465. As to Illinois statute, see further *Jackson v. Foote*, 13 Rep. 707 (U. S. Cir. Ct. Ill. 1882).

<sup>1</sup> *App v. Coryell*, 3 P. & W. 494. See *Oulds v. Harrison*, 10 Ex. 572.

<sup>2</sup> *Collamer v. Day*, 2 Vt. 144; *Tarleton v. Baker*, 18 Vt. 9; *Morgan v. Beaumont*, 121 Mass. 7; *Patterson v. Clark*, 126 Mass. 531. So in England, *Hampden v. Walsh*, L. R. 1 Q. B. D. 189; *supra*, § 351; *infra*, § 729.

<sup>3</sup> *Ruckman v. Pitcher*, 1 Comst. 392; S. C., 20 N. Y. 9; *Woodworth v. Bennett*, 43 N. Y. 273. See *infra*, § 754.

<sup>4</sup> *Harris v. White*, 81 N. Y. 532; *Alvord v. Smith*, 63 Ind. 58.

<sup>5</sup> *People v. Sergeant*, 8 Cow. 139.

<sup>6</sup> *Folger, C. J., Harris v. White*, 81 N. Y. 539. "It was not illegal, at common law, to make a bet or wager on a horserace; and an action to recover a wager won has been maintained. *M'Allester v. Haden*, 2 Camp. 438; *Blaxton v. Pye*, 2 Wils. 309; *Gibbons v. Gouverneur*, 1 Denio, 170;" *Folger, C. J., 81 N. Y. 544. See infra*, § 759.

<sup>7</sup> *Benj. on Sales*, 3d Am. ed. § 542a. In *Grizewood v. Blane*, 11 C. B. 526, *Jervis, C. J.*, left the question to the jury to say, "whether either party meant to purchase or sell the shares in question," telling them, if they did not, the contract was, in his opinion, a gambling transaction, and void. On a motion afterwards for a new trial, the opinion of the chief justice was sustained, *Creswell, J.*, among other observations, saying: "As to the evidence, I think it abundantly warranted the jury in coming to the conclusion

out any intention of receiving or delivering them, is void.

country we have a series of decisions holding such agreements to be invalid wherever the understanding between the parties is that there is to be no delivery, but that only the difference between the contract price and the market price at a designated time is to be paid.<sup>1</sup>

that there was no real contract of sale, but that the whole thing was to be settled by the payment of differences. It clearly was a gambling transaction within the meaning of the statute."

<sup>1</sup> Porter v. Viets, 1 Biss. 177; Young *ex parte*, 6 Biss. 53; Green *in re*, 7 Biss. 338; Clarke v. Foss, 7 Biss. 540; Rumsey v. Berry, 65 Me. 570; Noyes v. Spaulding, 27 Vt. 420; Simpson v. Shaw, 101 Mass. 185; Bigelow v. Benedict, 70 N. Y. 202; Story v. Salomon, 71 N. Y. 420; Kingsbury v. Kirwan, 77 N. Y. 612; Harris v. Tumbridge, 83 N. Y. 95; Brua's App., 55 Penn. St. 294; Smith v. Bouvier, 70 Penn. St. 325; Maxton v. Gheen, 75 Penn. St. 166; Swartz's App., 3 Brewst. 131; Fareira v. Gabell, 89 Penn. St. 89; North v. Phillips, 89 Penn. St. 250; Gheen v. Johnson, 90 Penn. St. 38; Dickson v. Thomas, 97 Penn. St. 278; Ruchizky v. De Haven, 97 Penn. St. 202; Lyon v. Culbertson, 83 Ill. 33; Gregory v. Wendell, 39 Mich. 337; Barnard v. Backhaus, 52 Wis. 593; Sawyer v. Taggart, 14 Bush, 727; Williams v. Carr, 80 N. C. 294; and cases cited Wald's Pollock, 277; Biddle on Stockbrokers, 299.

In Kirkpatrick v. Bonsall, 72 Penn. St. 165, Agnew, J., said: "We must not confound gambling, whether it be in corporation stock or merchandise, with what is commonly termed 'speculation.' Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh—that is, speculate upon—the probabilities of the coming market, and

act upon this lookout into the future in their business transactions; and in this they often exhibit high mental grasp and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions and buy or sell in a *bona fide* way."

In Barnard v. Backhaus, 52 Wis. 593, Cole, J., after quoting the above, added: "And the law does not condemn such transactions, providing the intention really is that the commodity shall be actually delivered and received when the time for delivery arrives. Consequently no legal objection exists to such time contracts, which are to be performed in the future by the actual delivery of the property by the vendor, and the receipt and payment of the price by the vendee, if the contract is in writing; and it is also true that a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time the contract was made the vendor has neither the goods in his possession nor has entered into an agreement to buy them. A party may go into the market and buy the goods which he has agreed to sell and deliver. Therefore a contract to deliver at a future day is not necessarily a wagering or gambling contract. But when such a contract is made as a cover for gambling, without any intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, then it comes within



On the other hand, where a broker employed to speculate on shares pays his principal's losses, according to custom, the

the statute of gambling, and is void in law. Where some of the transactions between the parties which enter into the consideration of a note and mortgage are mere gaming transactions, they render the whole security void. In the case *In re Green*, 7 Biss. 338, Hopkins, J., said: 'They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.' "

For rulings under Illinois statute against options, see *Tenney v. Foote*, 4 Ill. Ap. 594; *Williams v. Tiedemann*, 6 Mo. Ap. 269; and see article on Political Economy and Criminal Law, in *Criminal Law Magazine* for Jan. 1882.

In *Rourke v. Short*, 5 E. & B. 904, under the English statute, there was a difference of opinion between the plaintiff and the defendant, when settling a bargain for the sale of rags, as to the price fixed in a prior transaction between the parties. They finally agreed that the rags were to be paid for at three shillings a cwt. if the defendant's report of the former transaction was correct, and six shillings a cwt. if the plaintiff's report was correct; three shillings being less and six shillings more than the value of the goods per cwt. The goods were in any view to

be delivered at the price paid. It was held that the contract was void as involving a wager.

As to agreements to create a "corner" in stock, see *infra*, § 453*b*.

It is a significant fact that in the examination on Apr. 16, 1882, before the New York Senate Committee on corners in grain, Mr. Franklin Edsen, formerly president of the Produce Exchange, testified that the dealing in futures in grain was often necessary in order to handle grain economically.

In *Chandler in re*, 13 Am. L. Reg. N. S. 310 (an attempt to get up a "corner" in oats), the court held that none of the parties to the transaction who went into it without any intention of delivering or taking the oats could sue on the contract. The transaction "was as manifestly a bet upon the future price of the grain in question as any that could be made upon the speed of a horse or the turn of a card." The court did not hold that all "option" contracts were void, even though the party agreeing to deliver did not have the article on hand. The contract only became gambling when the object was to corner or otherwise to speculate. "Options stand on the same footing as any other species of contract. Where it appears that the intention of the parties is to contract for the payment of 'differences' merely, and not to deliver or accept stock, the law pronounces it a wager, irrespective of the form used to cover the transaction; but, on the other hand, where there is a *bona fide* intention to deliver or receive property, the agreement will be sustained." *Dos Passos on Stock Brokers*, 454.

The rulings of the courts on this issue must be considered in connection with the legislation to which they are

principal is liable to the broker for the amount so paid.<sup>1</sup> And to vacate an agreement as a gambling venture, whether at common law, or under the English or analogous American statutes, it is necessary to show that it was understood by both parties that the transaction was a mere wager, and that there was to be no delivery of the goods or stock.<sup>2</sup> But where

subject. Of such legislation the following illustrations may be given:—

The Revised Statutes of New York (1 Rev. Stat. 710, § 6) contained a provision to the effect that all contracts for the sale of stock not at the time in hand were void. In 1858 (ch. 134) this was repealed, and it was provided that no contract for the sale of stock “shall be void, or voidable, for any want of consideration, or because of the non-payment of any consideration, or because the vendor at the time of making such contract is not the owner or possessor of the certificate or certificates, or other evidence of such debt, share, or interest.”

In Massachusetts, sales of securities are void unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or is authorized by the owner or assignee, or his agent, to make the sale or transfer. See as construing this statute, *Barrett v. Hyde*, 7 Gray, 160; *Wyman v. Fiske*, 3 Allen, 238; *Price v. Minot*, 107 Mass. 49.

In Pennsylvania, a statute to the same effect was adopted, but subsequently repealed. *Krause v. Setley*, 2 Phila. 32.

An act of congress limiting the power thus to speculate was repealed in 1864. See 13 U. S. Stat. 303; *Dos Passos on Stock Brokers*, 405.

The English stock-jobbing act was repealed by 23 and 24 Vict. c. 28 (1860). See history of this legislation in *Dos Passos on Stock Brokers*, 382 *et seq.* Mr. *Dos Passos* concludes his summary as

follows: “The history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. In almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by ‘the unbridled and defiant spirit of speculation’ (*Hoffman, J., in Cussard v. Hinman*, 14 How. (N. Y.) Pr. 84, 90), despite the earnest efforts of the courts to enforce them, they have finally been repealed.”

<sup>1</sup> *Rosewarne v. Billing*, 15 C. B. N. S. 316. In *Rogers ex parte*, L. R. 15 Ch. D. 207, it appeared that S., a stock broker, having been authorized by C. to buy and sell specified stocks for C., and to receive or pay for him the “differences” representing profit or loss, bought and sold large amounts of stock as a principal, and appropriated them among certain clients including S. It was held that S. could recover from C. the balance of losses due S. on the whole transaction. “This,” said James, L. J., “is the ordinary case of a broker employed by a person who is speculating on the stock exchange, and authorized by his client to pay his losses, and actually paying them.” See *Fareira v. Gabell*, 89 Penn. St. 89; *Williams v. Carr*, 80 N. C. 294.

<sup>2</sup> *Grozeewood v. Blane*, 11 C. B. 536; *Thacker v. Hardy*, L. R. 4 Q. B. D. 685; *Green in re*, 7 Biss. 338; *Lehman v. Strassburger*, 2 Woods, 554; *Rumsey v. Berry*, 65 Me. 570; *Yerkes v. Salomon*, 11 Hun, 471; *Parsons v. Taylor*, 12 Hun, 252; *Bigelow v. Benedict*,

stock-jobbing is illegal, money lent for the purpose of carrying it on cannot be recovered, supposing it appear that the money was lent knowingly and with the purpose of furthering the illegal act. "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment?"<sup>1</sup>—It is not necessary to constitute a valid contract,

70 N. Y. 202; *Story v. Salomon*, 71 N. Y. 420; *Morris v. Tumbridge*, 83 N. Y. 95; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155; *Pixley v. Boynton*, 79 Ill. 351; *Cole v. Melmine*, 88 Ill. 349; *Logan v. Brown*, 81 Ill. 415; *Gregory v. Wendell*, 39 Mich. 337; *Barnard v. Barkhaus*, 52 Wis. 593; *Williams v. Carr*, 80 N. C. 294; *Sawyer v. Taggart*, 14 Bush, 727; *Williams v. Tiedemann*, 6 Mo. Ap. 269, and other cases cited *Wald's Pollock*, 278; *Benj. on Sales*, 3d Am. ed. § 542.

<sup>1</sup> *Per cur. Cannan v. Bryce*, 3 B. & Ald. 179. In *Third National Bank v. Harrison*, 10 Fed. Report. 248, we have the following from *Treat, J.*:—

"The principle may be considered well established that when a statute pronounces a gaming or usurious contract absolutely void no recovery can be had thereon. The gaming statute of Missouri destroys the negotiable character of a note, or other obligation, given for a gaming consideration within the terms of that statute. The doctrine that void transactions cannot acquire validity by transfer of paper obligations based thereon finds full sanction not only in authorities, *supra*, but in the many bond cases before the United States supreme court. *Thompson v. Bowie*, 4 Wall. 463; *Wells v. Supervisors*, 102 U. S. 625; *Buchanan v. Litchfield*, 102 U. S. 278; *Jarrolt v. Moberly*, 103 U. S. 580; *McClure v. Oxford*, 94 U. S. 429. The broad distinction remains between contracts void *ab origine*, by force of statutes whereby assignees and indorsees are unpro-

tected, and contracts *contra bonos mores*, which cannot be enforced between the original parties thereto, but are held enforceable when, being negotiable in form, they have passed to innocent holders for value.

"The notes in question were, it must be held for the purposes of this motion, given for balances on an 'option deal,' an illegal contract; being, as alleged, a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made. If the allegations of the answer are true, Alexander could not recover on the notes in suit; and the court was in doubt whether the position the bank occupies should not be considered as exceptional, and thus open the equities between the original parties. It is evident that the bank could at divers times have collected Alexander's demand note and turned over to him the collaterals; and it seemed that defendant's position had great force, viz., that the transfer of Harrison's notes as collateral to the bank under the circumstances was merely for the purpose of excluding the equities between the original parties. Still the stubborn fact remained that the bank is a *bona fide* holder for value within the rules laid down by the United States supreme court in *Swift v. Tyson*, 16 Pet. 1, and *Goodman v. Simonds*, 20 How. 343, no evidence being given that the bank had notice of the infirmity of the paper.

"The court holds that the transac-

that the vendor should have the thing in his possession. There may be actual sale, even without tactual possession on either

tion in question is not within the terms of the gaming laws of Missouri, but if it was an option deal, as charged, would be unenforceable between the original parties, and even in the hands of an innocent indorsee for value.

“The distinction is so clearly drawn, and the doctrines so exhaustively considered by Judge Thayer, of the St. Louis circuit court (with whose manuscript opinion in the Tinsley case I have been favored), that it would be a mere repetition of what has been thus so ably done, to attempt to travel over the same ground, and hence I quote largely from his opinion as follows:—

“The law is now well settled, in all of the states where the question has arisen, that there can be no recovery had upon a contract or sale of personality where the parties to such contract do not intend an actual delivery of the articles bargained for, but merely intend to settle differences at some future day between the price agreed to be paid for the commodity and the *then* market price. Such contracts are universally held to be invalid as against public policy, and in some instances they have been held to be in violation of statutes relative to gaming and wagers. *Lyon v. Culbertson*, 83 Ill. 33; *Sampson v. Shaw*, 101 Mass. 145; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Gregory v. Wendell*, 39 Mich. 337; *Rumsey v. Berry*, 65 Me. 570; *Williams v. Tiedemann*, 6 Mo. App. 269. But there is an apparent conflict of opinion touching the question whether a broker, factor, or commission merchant, who has been employed by his principal to make contracts of this character with some third party, and has done so in his own name, but for his principal's benefit, may maintain

an action against his principal to recover money expended for his principal at his principal's request in the settlement of losses accruing under such contracts. This precise question was considered in the case of *Green*, 15 N. B. R. 201 (U. S. Dist. Court, W. D. Wis.), and it was there held that the broker could not recover from his principal for moneys thus expended in the settlement of losses on such illegal ventures. But it is to be observed that the court, in the case last cited, based its decision mainly on a statute of Wisconsin, which declared all ‘notes and agreements void that had been given for repaying any money knowingly advanced for any betting and gaming at the time of such betting or gaming.’ And the evidence in the case cited showed that the broker not only made the illegal contracts in question, but that he advanced the money for the venture. The court accordingly held that the case fell within the statute, and that the broker could not recover money thus knowingly advanced in furtherance of a gambling transaction.

“There are other cases, arising between factors and brokers and their principals, which the courts have apparently treated as though the action was between the principals to the illegal transaction. But the different relation existing between the agent and his principal, in actions by the former to recover moneys expended for his principal in the settlement of losses on wager contracts, was apparently not called to the attention of the court. *Vide Gregory v. Wendell, supra*; *Williams v. Tiedemann, supra*.

“On the other hand, the law is well settled in England that if a broker be

side, if there be the intention *bona fide* to sell. It may often happen that a party desires, and this in pursuance of a line of

employed to make wager contracts, such as are voidable under 8 & 9 Vict. c. 109, § 18, and at the request of his principal the broker pays the amount due under such contract, *he can recover the amount so paid from his principal*, and the illegal nature of the contract with reference to which the money is paid is no defence to an action founded on such claim. *Rosewarne v. Billing*, 33 Law Jour. (1864) 55, N. S. Common Pleas, Michaelmas term, 1863; *Pidgeon v. Burslem*, 3 Exch. 465; *Jessopp v. Lutwyche*, 10 Exch. 614.

“In this country the same doctrine has been held substantially in the following cases: *Lehman v. Strassberger*, 2 Woods, 554; *Warren v. Hewitt*, 45 Ga. 501; *Clark v. Foss*, 10 Chicago Leg. N. 213.

“In the case of *Marshall v. Thurston* the court says: ‘We understand the charge of the lower court to be, in substance, that if the broker knowingly assisted the defendant by an advance of money and active agency, though not as principal, to gamble in the rise and fall of bonds, no recovery can be had; but if the broker merely acted as his agent in effecting contracts between him and third parties for the purchase or sale of bonds on time, the defendant and third parties intending to speculate in the rise and fall of prices, and defendant suffered losses which were paid by the broker at defendant’s request, or were paid and the payments subsequently ratified by the defendant by executing notes therefor, a recovery can be had. In this view the charge is supported by the authorities.’

“The rule which has the support of the great weight of authority (whatever may be thought of the policy and

morality of the rule) seems to be as follows: If a factor, broker, or commission merchant be employed by his principal to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys or sells in his own name, but on his principal’s account, and subsequently, after losses have occurred in such transactions, the agent advances money at his principal’s request to pay such losses, or if the agent pay such losses and the principal afterwards executes notes in the agent’s favor to cover the amounts so advanced, the agent may recover against his principal the advances so made at his request, or upon the notes so executed, notwithstanding the illegal character of the original venture. The promise implied in the one instance and expressed in the other is neither void for want of consideration nor tainted with illegality. It was even held in the case of the *Planters’ Bank v. Union Bank*, 16 Wall. 433, that where the defendant, in violation of law, had sold bonds for the plaintiff and received the proceeds, the plaintiff might recover the amount from the defendant, and that the illegal character of the transaction out of which the fund arose was no defence.

“But, on the other hand, if a broker or factor supply his principal with funds for the express purpose of enabling him to engage in illegal transactions, and if he (the agent) conducts the illegal venture in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purpose, nor will it enforce securities taken therefor.’”

In *Melchert v. Ins. Co.*, Cir. Ct.

business perfectly fair, to sell something, which, though not actually in his hands, could yet be obtained by him either in specie or in equivalent at any time he may desire. Endorsement of negotiable paper rests on this principle. I do not have the money which my endorsement calls for in my pocket; I may not have it in bank; but nevertheless my endorsement is a perfectly legitimate transaction. There is no reason why a debt payable in wheat or in any other common commodity should not be regarded in the same light. The custom of merchants, it is agreed, sustains transfers of money which is not in hand; there is no reason why the custom of merchants should not be permitted to establish similar transfers of articles into which money can be readily converted. This has been held to be the case with regard to assignments of goods in transit by transfers of bills of lading; and goods, of which

Iowa, 1882, 11 Feb. Rep. 193, it was held that an action could not be maintained against a telegraph company for negligence in non-delivery of a message, which the court held to be to direct a gambling investment. "If these contracts," said Judge Love, "were illegal gambling contracts, within the statute laws of Illinois, it was the plaintiff's plain duty not to fulfil them, and he cannot complain of the defendant's telegraph company that they were not sufficiently diligent in aiding him to perform his unlawful agreements. The contracts in question were for the delivery of rye in the month of September, at the seller's option. A contract for delivery at the seller's option may be valid or invalid. It depends upon the nature of the option as shown in the intention and purpose of the parties. The option may refer to the fact of delivery, or merely to the time of delivery. If it be the intention of the parties that the property shall be in fact delivered, giving the seller's option as to the time of delivery within a certain

period, I see no valid objection to such a contract. It is but a contract for sale of property to be delivered in the future, within a given time. But if it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfilment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay 'differences,' then the contract is void. Such a dealing amounts to a mere speculation upon the rise and fall of prices. It required no capital, except the small sums demanded to put up margins and pay differences. It promotes no legitimate trade. Any impecunious gambler can engage in it, with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at small risk, to agitate the markets, stimulate and depress prices, and bring down financial ruin upon the heads of the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and black Fridays and sudden fluctuations in values are its illegitimate progeny."

there are at any time large amounts in the market, may be obtained at least as readily as goods in transit. Supposing my specialty is trading in wheat, there is no more reason why an agreement by me to deliver a certain amount of wheat next week should be invalid, than would be my agreement, supposing me to be a professional man, to render next week certain professional services. Such is unquestionably the English rule;<sup>1</sup> and in this country there are high authorities to the same effect.<sup>2</sup> In Pennsylvania, it is true, it has been held that where, as a matter of fact, it appears that the vendor has not any reasonable expectation of procuring the article he sells, and no intention of procuring it, the sale is to be regarded as a mere gambling venture, and the contract will not be enforced.<sup>3</sup> The decisions reached in these cases can be sustained on the hypothesis that, as a matter of fact, it appeared that there was no intention to deal with the things sold in specie, but merely with difference in price. If so, the proposal would substantially be, "if I deposit \$1000 with you will you give me \$10,000 in case of a future uncertain event occurring in a particular way;" and this would be a gambling wager. On the other hand, if there be either an actual delivery of the thing purchased to the purchaser or his agent, or if there be a right to call for such thing so deposited, such thing being obtainable for the purpose, then the transaction cannot be regarded as a gambling adventure. Whether the last-named condition of things exists is a question, not of law, but of fact.<sup>4</sup>

<sup>1</sup> *Ashton v. Dakin*, 4 H. & N. 867. "If the law were held to be otherwise, nearly every contract for the sale of stock on the London Stock Exchange would be gambling; for in almost every instance the jobber buys intending to resell before a delivery is made to him, and giving up the name of a third party as the purchaser." *Biddle on Stock Brokers*, 305.

<sup>2</sup> *Cameron v. Durkheim*, 55 N. Y. 425; *Pixley v. Boynton*, 79 Ill. 351; *Sawyer v. Taggart*, 14 Bush, 727; *Pickering v. Cease*, 79 Ill. 727.

<sup>3</sup> *Brua's App.*, 55 Penn. St. 294;

*Fareira v. Gabell*, 89 Penn. St. 89; *North v. Phillips*, 89 Penn. St. 250; *Gheen v. Johnson*, 90 Penn. St. 38; *Ruchizky v. De Haven*, 97 Penn. St. 202; *Dickson v. Thomas*, 97 Penn. St. 278.

<sup>4</sup> See, for a criticism of the Pennsylvania cases above cited, *Dos Passos on Stock Brokers*, 431 *et seq.*

In *Hatch v. Douglass*, 48 Conn. 116, the defendant wrote to the plaintiffs, who were stock brokers in New York city, "I want to buy one hundred shares Union Pacific stock on margin. Will you take \$1000 first mortgage New

§ 453 a. *Sales on option* are sometimes spoken of as gambling transactions; but this is not necessarily the case. The fact is, the meaning of the term "option" varies with local usage.

York and Oswego Railroad, and do it?" The plaintiffs answered that they would, and at once bought the stock, and soon after sold it by defendant's order at a profit. Other stocks were afterwards bought and sold under the same arrangement, resulting in a loss on the entire account. The suit was brought to recover this loss. It was held that the suit could be maintained. Carpenter, J., in delivering the opinion of the court, said: "The authorities are clear that a contract relating to stocks or other commodities, to be performed at a future day, by which the parties contemplate only the payment of the difference in the market value by one or the other as the case may be, is a mere gaming contract and void. So if parties in form contract to sell goods to be delivered in the future, the seller in fact having no goods, and the parties not intending an actual delivery, but contemplating merely a payment of the difference between the market value on that day and the agreed price, it is a gaming contract and cannot be enforced. Contracts of this nature, however, are distinguishable from speculating contracts. A man may legitimately buy goods or stocks intending to sell in a short time and take advantage of an advance in the price if there is one. In such a case he takes the risk of a decline, but that does not make it a gambling contract. And he may purchase goods at a fixed price to be delivered at a future day, if the parties intend an actual delivery and acceptance. The actual intention may be difficult to prove or disprove; but when once the fact is estab-

lished, one way or the other, there is no difficulty in applying the law.

"Now there are in the transactions between these parties some of the elements which are usually found in a gambling contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay the difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery—got to the principal, but to the agents for the principal. The plaintiffs advanced the money and held the stock in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase-money. The import of the finding is, and we must so regard it, that it was an actual and *bona fide* employment of the plaintiffs to purchase stocks, and not a mere formal employment designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commissions and interests on their advancements, whether the stocks went up or down. The most that can be said of them is, that they knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral."



In a recent excellent work on stockbrokers<sup>1</sup> is the following: "Option signifies in America a right or privilege to receive or deliver a certain number of shares of a specified stock on a certain day at a certain price, with or without interest. In England it signifies the right to buy or sell at a future day at a certain price, or to do neither." Now if this were all, there is nothing in such contracts necessarily illegal. Contracts to sell or purchase at a future date at the election of the promisor, subject to certain contingencies, are no more illegal than are other contracts conditioned on a future contingency.<sup>2</sup> Nor is there anything necessarily illegal in a conditional agreement to buy or sell in the future at the election of one of the parties. I may own, for instance, a house in a particular block, and I may say to my neighbor who owns the next house, "now there may come a contingency in which it may be important for me to own both houses, or to own neither, give me the 'option' to do this, and I will pay you so much at once for this privilege." This, as we will presently see, is what, were the bargain made in the stock-market, would be called a "straddle;" nor, however disreputable may be some of the brokerage transactions to which the name is applied, is there anything in such a bargain which is in itself immoral or inequitable, or which should prevent it from being enforced. If this be the case, we must *a fortiori* hold that an agreement by one party to give another an "option" has in it nothing necessarily immoral or inequitable. There may be a contingency, for instance, which may

"Option"  
not neces-  
sarily  
illegal.

<sup>1</sup> Biddle on Stock Brokers, 72. According to Mr. Dos Passos, an "option" is a contract by which A., in consideration of the payment of a certain sum to B., acquires the right or privilege of buying from or selling to B. specified securities at a fixed price within a certain time. (To this are cited *Story v. Salomon*, 71 N. Y. 420, and opinion of Van Hoesen, J., in court below, 6 Daly, 531; *Yerkes v. Salomon*, 11 Hun, 471.) "These options are of three kinds, viz., 'calls,' 'puts,' and 'straddles' or

'spread eagles.' A 'call' gives A. the option of selling or buying from B. or not certain securities. A 'put' gives A. the option of selling or delivering to B. or not, certain shares of said securities. A 'straddle' or 'spread eagle' is a combination of a 'put' and a 'call,' and secures the right to buy or sell to B. or not a certain number of shares of specified securities." Dos Passos on Stock Brokers (1882), 444.

<sup>2</sup> See *infra*, §§ 579 *et seq.*

make it necessary for me to go to Liverpool next week, and I desire to obtain a particular room in a particular steamer, and I pay something for this right, or I pay something for the refusal, a month hence, of a yacht, or of a horse, or of a bale of cotton. Now there can be no question that when there is a fixed price, so that the contract is sufficiently definite, agreements of this class are binding.<sup>1</sup> At the same time we must remember that it is not in this sense alone that the term "option" is used. Thus in the Revised Statutes of Illinois we have the following:—

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the prices of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10, nor more than \$1000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered as gambling contracts, and shall be void."<sup>2</sup>

In a recent charge to the grand jury of Cook County, Illi-

<sup>1</sup> The argument in the text is applied as follows in Melsheimer's Stock Exchange (London, 1879), as adopted in Dos Passos on Stock Brokers, 445. "Let us suppose a person who is possessed of certain securities to be desirous of selling if he could get a bid, say one per cent. higher than the present price, and to be at the same time desirous of doubling his holding if he could buy at a price one per cent. lower. If he gives his instructions in this form to his broker, it may well happen that the price does not fluctuate sufficiently to make it possible to carry out either transaction. But the same practical result may be attained with certainty by the owner of the securities taking a one per cent. price for the put and call of them, for the

money thus received would be, as it were, a reduction of one per cent. in the purchase price if the security is put upon him, and would equally, as it were, go to increase the selling price if it is called from him. There is, of course, this difference, that if the security is at precisely the same price on the option day as on the day the bargain was made, it may happen that the security is neither put nor called, and in that case the owner will have secured his one per cent. without further liability, and be in a position to repeat the process. Under such circumstances, the option could not be said to be void as a wager."

<sup>2</sup> Rev. Stat. Ill., ch. 38, § 180; see as to statutes of other states, *supra*, § 453.

nois, by Judge Jameson,<sup>1</sup> we have the following exposition of this statute:—

“By this section [that above given] are denounced three separate misdemeanors—the sale of options, forestalling the market, and cornering the market. All these have either, in name or in spirit, been always interdicted by the common law, and that of ‘forestalling’ was, at a very early day, made punishable in England by statutes. Over a century ago a movement arose in England for abolishing the restrictions upon the freedom of trade, and these statutes were, as a part of them, repealed; but the common law has remained, both there and in this country, unchanged, though fallen into disuse. The exigencies of the times induced our legislature a few years since to re-enact the statute against forestalling, and to add to it those touching options and corners, which I have read—offences in which the criminal ingenuity of our ancestors seems not to have been equal.

“The first offence is the illegal sale of options for future delivery of grain and other commodities. The fact that property is sold to be delivered at a future day does not make the contract illegal; or that it is not at the time possessed or owned by the seller; or that the time of its delivery is left, within fixed limits, optional with the buyer or seller; though in one sense any such sale is a sale of an option apparently within the statute. What makes it a gambling contract is the intent of the parties that there shall not be a delivery of the commodity sold, but a payment of differences by the party losing upon the rise or fall of the market. Of this intent the jury are to be the judges, and it may be inferred directly from the terms of the contract, or indirectly from the course of dealing of the parties.<sup>2</sup>

“By this legislation the general assembly had no purpose to interdict *bona fide* sales of commodities, but only such as are colorable or fraudulent, contrived by both parties as a cover merely for gambling transactions.”

“The statute,” said Craig, J.,<sup>3</sup> “does not prohibit a party

<sup>1</sup> Chicago Legal News, Oct. 15th, Wolcott v. Heath, 78 Ill. 433; Pixley v. Boynton, 79 Ill. 351.

<sup>2</sup> Pickering v. Cease, 79 Ill. 328; <sup>3</sup> Logan v. Brown, 81 Ill. 415.

from selling or buying grain for future delivery; such was not the purpose of the statute; nor can it make any difference, as to the legality of the contract, whether the person who sells for future delivery, at the time the sale was made, has on hand the grain; a party may sell to-day a certain quantity of grain for delivery in a week or a month hence, and then go upon the market and buy the grain to fill the contract.”<sup>1</sup> “Option,” therefore, as a statutory term in Illinois, means a contingent bargain for differences of price, as distinguished from a bargain for the thing itself, and as such is illegal.<sup>2</sup> But in New York, there is nothing in itself illegal in an “optional contract for the sale of any marketable commodity, when, for a consideration paid, one of the parties binds himself to sell or receive the property at a future time, at a specified price, at the election of the other. Mercantile contracts of this character are not infrequent, and with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and, while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and, therefore, bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver; and

<sup>1</sup> A contract of this class was held valid, the court relying on *Pixley v. Boynton*, 79 Ill. 351; *Pickering v. Cease*, 79 Ill. 328; *Sawyer v. Taggart*, 14 Bush, 727. And see *Cole v. Milmine*, 88 Ill. 349.

<sup>2</sup> Under this statute a sale “where the seller had only an option as to the time of delivery” is valid. *Blodgett, J., Jackson v. Foote*, 12 Fed. R. 41; citing *Pixley v. Boynton*, 79 Ill. 351; *Cole v. Milmine*, 88 Ill. 349. It was afterwards held in the same state, that a contract for the sale of wheat by which “neither party expected the delivery of any wheat, but in case of default in keeping margins good, or even at the time of delivery, they only expected to settle this contract on the basis of

difference, without either performing or offering to perform his part of the agreement,” “was only gambling in the price of wheat. . . . If the one party is not to deliver, or the other to receive the grain, it is in all but name a gambling on the price of the commodity, and the change of name never changes the quality or nature of things. It has never been the policy of the law to encourage, or even sanction, gaming transactions, or such as are injurious to trade or are immoral in their tendency; and the old maxim that courts will always suppress new and subtle inventions in derogation of the common law would be applicable to such contracts.” *Lyon v. Culbertson*, 83 Ill. 33.

the purchaser may in the same way guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods.”<sup>1</sup> The mere fact, also, that wheat is to be delivered at a future day, does not infect the transaction with the element of gambling.<sup>2</sup>

<sup>1</sup> Andrews, J., *Bigelow v. Benedict*, 70 N. Y. 202; see *Chicago R. R. v. Dane*, 43 N. Y. 240; *Cooke v. Davis*, 53 N. Y. 318; *Story v. Salomon*, 71 N. Y. 420; *Kirkpatrick v. Bonsall*, 72 Penn. St. 155; discussed in *Biddle on Stockbrokers*, 311 *et seq.*

<sup>2</sup> *Cole v. Milmine*, 88 Ill. 349; see *supra*, § 453.

In a case in the New York court of appeals in 1880, *Harris v. Tumbridge*, 83 N. Y. 92, the plaintiff, Mrs. H., bought through the defendant, a New York stock broker, a stock option or privilege known as a “straddle,” which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price within sixty days. It was in evidence that the plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a “straddle,” offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuation in the stock during the pendency of the contract would amount to eight per cent., and in case it did not, agreeing to refund the amount paid less commissions. The plaintiff sent \$400 to the defendants to invest in a sixty day “straddle.” Under this supposed guaranty, on the next day after the purchase, the defendant sold the stock “short,” which resulted in a loss. In an action to recover damages, it was ruled that defendant had no authority to make the sale, that in the absence of any directions from

plaintiff, it was the defendant's duty to have closed the contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care. It was further held the question of negligence and want of skill and care in the performance of his duty as agent, was properly submitted to the jury, and authorized a recovery.

The defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. It was held that the contract was not of necessity a wager contract and void under the statute.

“The plaintiff,” said Finch, J., “bought, through the agency of the defendant, a stock option, or privilege, known in the language of brokers as a ‘straddle.’ The word, if not elegant, is at least expressive. It means the double privilege of a ‘put’ and ‘call;’ and secures to the holder the right to demand of the seller at a certain price within a certain time a certain number of shares of specified stock, or to require him to take, at the same price within the same time, the same shares of stock. The continuance of the option is fixed by the agreement, and in this case was for sixty days. The value of a ‘straddle,’ it is proven, depends upon the fluctuation of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized; and of course the longer the option continues, the greater the chance of such fluctuations during the period.” . . . “It is next argued that this

§ 453 b. It has been held in Massachusetts,<sup>1</sup> that a contract to get up a corner in stock, connected with a plan by the “cornerers” to make large purchases to be delivered to them after the “corner” had been completed by them, is invalid at common law. This may be sustained on the ground that such a “corner” involves a cheat by false pretence. When the “cornerers” go to A., and say to him, “we want to buy 10,000 bales of cotton, to be delivered next month,” this is equivalent to a representation on their part that as far as they know the cotton is obtainable; and if they have taken measures making it impossible that it should be obtained, their conduct amounts to a false pretence. For another reason such a contract may be regarded as inoperative. A contract whose performance is made impossible by any action of the promisee does not bind the promisor.<sup>2</sup> Now this is the case when a “cornerer” makes a contract for the purchase of articles which he has prevented the party purchasing from delivering to him except at a ruinous sacrifice. The Illinois statute, as has been just seen, invalidates sales based on corners; and of this we have the following exposition by Judge Jameson, in the charge just quoted: “The offence of cornering the market is not, so far as I am aware, mentioned in the books, but it is one of the numerous family of frauds of which the various members in their fight with society assume an infinitude of shapes and colors. To detect and punish these, notwithstanding the novelty and apparent innocence of their disguises, is the first business of courts and justices. The thing which we know as a ‘corner’ in the market, might be briefly described as a process of driving unsuspecting dealers in grain, stocks, and the like, into a ‘corral,’ and relieving them of their purses. The essence of the offence consists in

was a gambling transaction, and as such prohibited by statute. It may have been, but there is no proof that it was, and no such defence was pleaded. The contract was not of necessity a wager contract.” See, to the effect that a broker who advances to his principal money to be employed by the latter in stock wagering cannot recover, *Thacker v. Hardy*, 27 W. R. 158; *Lehman v. Strassberger*, 2 Wood C. C. 554; *Woodworth v. Bennett*, 43 N. Y. 273.

<sup>1</sup> *Sampson v. Shaw*, 101 Mass. 145.

<sup>2</sup> *Supra*, § 312.

the party securing a contract for the future delivery of some commodity at his option, and then, by engrossing the stock of such commodity in the market, making it impossible for the other party to complete his contract, but by purchasing of his adversary at his own price, or paying in cash the difference fixed by such adversary. As was said of another great wrong, if this is not wrong then nothing is wrong."<sup>1</sup>

<sup>1</sup> The parties to a corner are divided as "bulls" and "bears." The "bears" are looking forward to a decline, and agree to sell certain securities, which they do not hold, for delivery at a fixed price at a future date; and their object is to beat down the stocks as much as they can prior to the time of sale. The "bulls" are speculators who hear of this, and who try to get into their hands as much of the securities as they can, so as to compel the "bears" to buy from them at an exorbitant price. In itself there is nothing illegal in a contract to sell a security at a future day, nor is there anything illegal in purchasing securities under the impression that they are going to rise in value. The illegality comes in (1) when there is a combination by several parties by false pretences or false rumors to raise or depress value, or (2) when the object is to absorb a staple in such a way as to produce public distress.

By the New York statute of 1858, ch. 134, heretofore specified, "short" sales of securities (*i. e.* sales of securities by a party by whom they are not at the time held) are sanctioned. How far they are prohibited by the Illinois statute has been already discussed.

The question in the text is thus discussed by me in the *Criminal Law Magazine* for January, 1882:—

"It does not follow, as we will see, that because a transaction is invalid it is indictable; and on principle we must hold that the indictability of a 'cor-

ner' depends not upon the object itself, but on the means employed. For one man to 'corner' another by buying something that that other wants, is not an indictable offence; since the whole basis of trade is the purchase of goods by one person in order to sell to another person at an advance. If this is allowable for one person, it is allowable for a number of persons acting in combination. In fact, it has been by companies of men combining to buy certain commodities and to refuse to sell except on highly remunerative terms, that some of our most beneficial business enterprises have been conducted. Had it been held to be indictable for two or more capitalists to combine to hold any property until it reaches a specific figure, there is scarcely a railroad that could have been built, scarcely a mine that could have been dug. Nor are such combinations when directed to the *preservation* of property, likely to be less beneficial. Some months ago, when the credit of the Reading railroad received a great shock, some of its leading friends agreed not to let the stock fall below 40; to buy up all offered below that figure, and not to sell until that figure was reached. They argued that if the threatened panic should not be checked, not only would their property, but the property of multitudes of meritorious small holders, be exposed to disastrous fluctuations. Similar operations took place in England more than once, during the Napoleonic wars,

§ 454. The statute of 9 Anne, c. 14, s. 1, avoids all securities of which the whole or part of the consideration is money won

large purchases of the public funds being made from time to time by great capitalists, in the interest of the administration, for the purpose of keeping up the funds to a specific mark. Such movements are often not only salutary but in a high degree public spirited. Nor, even when these attributes cannot be claimed, can it be said that the criminal law ought to take hold of all cases in which 'corners' are got up for the purpose of compelling purchasers to buy at an inordinate advance. To determine what advance is and what is not inordinate is a function that (fraud not being charged) no court of justice is competent to exercise. Nor can it be said that because a contract is void in law, the parties to it, or any one of them, is obnoxious to indictment. Unlawfulness and indictability, we must remember, are far from being convertible. So far from all contracts which are void in law being indictable, it is a settled principle that indictments do not lie to punish participation in void contracts which are not tainted by fraud or coercion. Sunday contracts are void; usurious contracts are in many states void; but to make participation in Sunday contracts and usurious contracts indictable, would be to abolish the distinction between civil and criminal jurisdiction, so far as concerns the object of trial, and to impose upon the community an intolerable burden of espionage and of misrule. The conditions of indicta-

bility in such cases should be coercion or fraud.

"As to fraud, little need be said. If there be false pretences or false personation employed, there can be no question that to get up a 'corner' is indictable, even though the offence is unconsummated. It is as to coercion that the difficulty arises. A conspiracy to obtain money by coercion is unquestionably indictable at common law. And of coercion there are two kinds. The first is physical, and when this is applied for the purpose of obtaining money, there is no doubt that an indictable offence is made out. The second is moral, and here the vexed question before us emerges. Is it 'moral' coercion, so as to make the use of it for the purpose of obtaining money indictable, to buy up any particular necessary commodity for the purpose of getting inordinate prices? We have some analogies in this respect to guide us. It has been held that he who drives another before him till the victim plunges into a river in terror and is drowned, is guilty of homicide.<sup>1</sup> It has been held, also, that the maxim, *volenti non fit injuria*, does not apply to a person succumbing under the paralysis of extreme need or fear.<sup>2</sup> It is possible to conceive of the buying up of the corn, or the meat, or the coal of a community so exhaustively as to compel purchasers in agony to pay any price that the speculators demand. But to make out a case of coercion of

<sup>1</sup> R. v. Pitts, Carr. & M. 284.

<sup>2</sup> See cases enumerated in Whart. Cr. L. (8th ed.) §§ 164, 167, 521. To this, however, it is to be added that when to the absorbing of all of a particular commodity that is in the mar-

ket, is added a purchase for future delivery of large blocks of such commodity from a party ignorant of the "cornering," this, as has been said, is an attempt to cheat by false pretences, and the contract is void.



by gambling or betting, or the repaying of money lent for gambling or betting. By the statute 5 & 6 Wm. IV. c. 41, s. 1, such securities, instead of being absolutely void, are deemed to have been made for an illegal consideration; and under this statute notes for gambling debts may be good in the hands of *bona fide* holders for value, such parties, however, having the *onus* on them of proving consideration.<sup>1</sup> But at common law a gaming contract, not tainted by fraud, is not void.<sup>2</sup> And when money, fairly lost, has been paid, it cannot at common law be recovered back;<sup>3</sup> though it may be otherwise by statute.<sup>4</sup> There is, it is true, high authority for holding that a court of equity will compel the surrender of securities given for gambling debts.<sup>5</sup> And equity, under cir-

Securities given for gaming debts void, but money paid cannot be recovered back. —Price of gambling materials.

this class the following conditions are necessary: First, the thing should be a necessity of life. We cannot speak of coercion in buying articles of luxury or taste. Secondly, the market must be so engrossed as to produce an actual famine. Anything short of this would make it an indictable offence for holders of grain, or meat, or coal, to agree to sell only for remunerative prices; and not only, therefore, would one of the great safeguards against panics be removed, but the regulation of prices would be given to courts. This might be consistent with high toryism. It might be consistent with communism. But it is not consistent with constitutional republicanism. Nor can such a jurisdiction affect beneficially even the classes it is designed to aid. Monopolies, unless protected by the state, are soon headed off, when their gains become exorbitant, by the intrusion of other capitalists offering reduced prices. But when a price is fixed by law it cannot be changed. It may prove to be ruinous to purchaser, or it may prove to be ruinous to vendor; but whatever it may prove to be it must remain. Nor would business men of character go

into speculations which would expose them to indictment; and as there is no large enterprise that would not be open to this charge, those entering into such enterprises would be men without character."

<sup>1</sup> Leake, 2d ed. 752; *Hay v. Ayling*, 16 Q. B. 423; *Edmunds v. Groves*, 2 M. & W. 642; *Bingham v. Stanley*, 2 Q. B. 117.

<sup>2</sup> *Wilkinson v. L'Eaugier*, 2 Y. & Col. 364; *Babcock v. Thompson*, 3 Pick. 446; but see *Wilkinson v. Touseley*, 16 Minn. 299.

<sup>3</sup> *Cotton v. Thurland*, 5 T. R. 405.

<sup>4</sup> *Spalding v. Preston*, 21 Vt. 9; *Gotwalt v. Neal*, 25 Md. 434; *Thomas v. Cronise*, 16 Ohio, 54; *Cleveland v. Wolff*, 7 Kans. 184; *Thorpe v. Coleman*, 1 C. B. 990. See Story on Cont. § 695. "If one, having lost money by gambling, or on a wager, pays it, the law will not aid him to recover it back." *Blodgett, J., Jackson v. Foote*, 12 Fed. Rep. 41.

<sup>5</sup> 1 Story Eq. Jur. 12th ed. § 303, citing *Rawden v. Shadwell*, Amb. 268; *Woodroffe v. Farnham*, 2 Vern. 291; *Portarlington v. Soulby*, 3 My. & K. 104; *Osbaldiston v. Simpson*, 13 Sim.

cumstances of oppression or fraud, will enjoin a plaintiff from enforcing a judgment obtained on a gambling contract;<sup>1</sup> and will set aside a deed the consideration of which is an illegal wager.<sup>2</sup> But a losing party, not distinctively a victim or a dupe, will not be assisted in recovering back money paid by him on his losses.<sup>3</sup> Judge Story, indeed, goes so far as to maintain that money lost by gambling should be recovered back "in furtherance of a great public policy, independently of any statutable provision." But Mr. Perry, the latest editor of Judge Story's work on Equity Jurisprudence, adds, "the opposite rule has finally prevailed, with few exceptions. And we are not able to comprehend how, or why, a court of equity should be able to grant relief upon principles different from those recognized in courts of law. There may be exceptions, based upon great oppression, and unconscionable advantage taken of one's weakness or want of caution, through the form of an illegal contract, where the courts of equity will treat the fraud as being the chief ingredient, and grant relief to the injured party upon that ground. But where the parties stand upon equal footing, and the contract is illegal, they cannot expect aid either from the courts of law or equity."<sup>4</sup>—In most states, by statute, provision is made for the recovery back of money lost in gambling.<sup>5</sup>—That a deposit on an illegal wager may be recovered back will be hereafter seen.<sup>6</sup>—A broker cannot recover for the value of services in conducting gambling contracts.<sup>7</sup>—When articles which are exclusively used for gambling are sold, their price cannot be recovered. But it is otherwise when they may or may not be so used. Thus, it is no defence to an action for the price of a billiard table that it may be used for gambling purposes, even though

513; though see *contra*, *Cowles v. Raguet*, 14 Ohio, 55; *Bispham's Eq.* § 223.

<sup>1</sup> *Skipwith v. Strother*, 3 Rand. (Va.) 214.

<sup>2</sup> *Thomas v. Cronise*, 16 Ohio, 54.

<sup>3</sup> *Supra*, § 353; *Bispham's Eq.* § 223; *Adams v. Gay*, 19 Vt. 358; *Spalding v. Preston*, 21 Vt. 9; *Gotwalt v. Neal*, 25 Md. 434; *Cowles v. Raguet*, 14 Ohio,

55; *Thomas v. Cronise*, 16 Ohio, 54; *Adams v. Barrett*, 5 Ga. 404. See as to recovery back from stakeholder, *supra*, § 450.

<sup>4</sup> *Story's Eq.* 12th ed. § 304.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Infra*, § 729.

<sup>7</sup> *Barnard v. Backhaus*, 52 Wis. 593. See *supra*, § 453, for opinion.

the vendor may have reason to suspect that such use is intended.<sup>1</sup>

§ 455. By the statute 19 Geo. II. c. 37, s. 1, marine insurances, without interest in the thing insured, are void as far as concerns British ships.<sup>2</sup> Hence to entitle a party on such an insurance to recover, he must prove his interest, and can recover only what is his real loss.<sup>3</sup> The parties, however, may bind themselves to value the insured interest at a specific figure;<sup>4</sup> and in case of total loss, the insured can recover the full extent of this valuation, though no more.<sup>5</sup> Where the loss is partial, the insured recovers *pro tanto* on the agreed value.<sup>6</sup>

By statute marine insurances without interest void.

§ 456. By the statute 4 Geo. III. c. 48, life insurances without interest are void; though under this statute it is sufficient if there was an insurable interest at the time of effecting the insurance.<sup>7</sup> As insurable interests are regarded the interest a person has in his own life, or in that of his wife, or, in the case of a wife, in that of a husband;<sup>8</sup> the interest a creditor has in his debtor's life;<sup>9</sup> the interest an employee has in the life of an employer;<sup>10</sup> though not the interest a parent has in a child's life, unless the parent be in some way dependent on the child.<sup>11</sup>

So of insurances of life.

§ 457. A fire insurance, without an insurable interest, is void in England, both as a wagering contract and as prohibited by 14 Geo. III. c. 48. But as having insurable interests have been regarded carriers or

And so of fire insurances.

<sup>1</sup> *Brunswick v. Valleau*, 50 Iowa, 303; *Lidgett v. Secretan*, L. R. 6 C. P. 120; *supra*, § 343.

<sup>2</sup> See, as to this limitation, *Allkins v. Jupe*, L. R. 2 C. P. D. 375.

<sup>3</sup> *Leake*, 2d ed. 753; *Seagrave v. Ins. Co.*, L. R. 1 C. P. 305; *Ebsworth v. Ins. Co.*, L. R. 8 C. P. 596. That the principle of this statute is part of the common law in Pennsylvania, see *Pritchett v. Ins. Co.*, 3 Yeates, 458.

<sup>4</sup> *Ibid.*; *Irving v. Manning*, 6 C. B. 391; *Barker v. Janson*, L. R. 3 C. P.

616.

<sup>5</sup> *Ibid.*; *Bousfield v. Barnes*, 4 Camp. 228; *Bruce v. Jones*, 1 H. & C. 769.

<sup>6</sup> *Lewis v. Rucker*, 2 Burr. 1167; *Denoon v. Ins. Co.*, L. R. 7 C. P. 341.

<sup>7</sup> *Dalby v. Ins. Co.*, 15 C. B. 365.

<sup>8</sup> *Leake*, 2d ed. 755.

<sup>9</sup> *Downes v. Green*, 12 M. & W. 481.

<sup>10</sup> *Hebdon v. West*, 3 B. & S. 579.

<sup>11</sup> *Halford v. Kymer*, 10 B. & C. 724; *Worthington v. Curtis*, L. R. 1 C. D. 419.

other bailees, if responsible for losses by fire;<sup>1</sup> and trustees, assignees, and caretakers, responsible to the real owner.<sup>2</sup>

§ 458. With gambling contracts may be associated contracts to violate lottery laws. When a statute makes lotteries illegal, all contracts to carry on lotteries, or of which lotteries form part of the consideration, are void.<sup>3</sup> A lottery, however, to be within the purview of the statutes, must be a distribution of prizes by chance among parties invited to buy shares, and does not include contracts between two or more individuals to settle a disputed issue by lot. But a distribution of prizes by chance among all invited to buy shares, this not being in pursuance of a prior arrangement between them, is a lottery, no matter how artfully the scheme may be disguised. Thus, in an action in New York, in 1876, the defendant to a suit for goods sold, consisting of candies and silverware, claimed that they were to be used in a lottery. The candies were put up by the plaintiff in packages, known as prize candy packages, in some of which there were tickets, each with the name of a piece of silverware on it. The defendants intended to sell the packages for more than their value, the purchaser taking the chance of getting a package containing a ticket. It was ruled that this was a lottery under the statute, and that the plaintiff could not recover.<sup>4</sup> Nor does it affect the question that in the scheme there are no blanks.<sup>5</sup>

Contracts based on lotteries illegal.

## XI. USURY.

§ 461. According to modern political economy, the trade in money should be as unrestricted as the trade in goods, and laws limiting the one should be as strictly construed as laws limiting the other. In

<sup>1</sup> *Waters v. Ins. Co.*, 5 E. & B. 870; *London, etc. R. R. v. Glyn*, 1 E. & E. 652.

<sup>2</sup> *Marks v. Hamilton*, 7 Ex. 323; *Collingridge v. Ins. Co.*, L. R. 3 Q. B. D. 173.

<sup>3</sup> *U. S. v. Olney*, 1 Abb. U. S. 275; *State v. Clarke*, 33 N. H. 329; *Com. v. Thacher*, 97 Mass. 583; *Hull v. Ruggles*, 56 N. Y. 424; *Hunt v. Knicker-*

*bocker*, 5 John. 327; and other cases cited Wh. Cr. L. 8th ed. § 1491.

<sup>4</sup> *Hull v. Ruggles*, 56 N. Y. 424. See, to same effect, *Morris v. Blackman*, 2 Hurl. & C. 912; *U. S. v. Olney*, 1 Deady, 461; *People v. Art Union*, 7 N. Y. 240; *Thomas v. People*, 59 Ill. 160; *Eubanks v. State*, 3 Heisk. 488.

<sup>5</sup> *Wooden v. Shotwell*, 3 Zab. 465.

practice, however, there is this wide difference, that usury laws are passed to regulate the traffic of subjects intra-territorially, while tariff laws are laid to regulate their traffic extra-territorially. We hear of no tariff on the exportation of money, and no usury limitations on the home sale of goods. But both as to tariff and usury laws the same tests are applicable. They both are in restraint of liberty, and are, therefore, to be strictly construed. And this view is strengthened by the gradually diminishing area of territory in which usury laws prevail.<sup>1</sup> The presumption of sympathy with accepted economical views is now as much against the authority of usury laws as it once was in favor of them. When they exist, also, they no longer rest on a common international basis. They assume as many distinct forms as there are jurisdictions. In some states it is prescribed that all usurious contracts shall be null and void. In other states the only penalty is a forfeiture of the unlawful interest. In other states intermediate positions are taken. In this complexity of legislation it is impossible to find any common basis of agreement on which uniform international rules can rest.<sup>2</sup>

<sup>1</sup> See, however, *supra*, § 362.

<sup>2</sup> See Bispham's Eq. § 222; Prov. Bk. v. Frost, 14 Blatch. 233; Dayton v. Moore, 30 N. J. Eq. 543; Duquesne Bank's App., 74 Penn. St. 426; Cooper v. Braswell, 59 Ga. 616.

In *Montague v. Sewell*, 57 Md. 407, a case in which the facts, which were numerous and complicated, indicated a loan of \$30,000, at usurious interest, under the form of a ground-rent, Alvey, J., delivering the opinion of the court, said: "The form taken is in all respects legal, and the instruments used fail to disclose any taint of usury. But, as said by the supreme court in *Scott v. Lloyd*, 9 Pet. 446, while the purchase of an annuity, or a ground-rent, if a *bona fide* sale, has never been considered as usurious, though more than six per cent. profit be secured, yet it is manifest that, if

giving this form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. . . . And as in such cases the original intention of the parties can seldom be arrived at except by resort to matters *dehors* the particular instruments of writing executed by them, extrinsic evidence must be received to show the real nature and intent of the transaction. *Tyson v. Rickard*, 3 H. & J. 109, 114; *Andrews v. Poe*, 30 Md. 486. . . . See, also, *Wetter v. Hardesty*, 16 Md. 11; and *Rouskulp v. Kershner*, 49 Md. 524. . . .

"It is insisted, however, that notwithstanding the transaction may be found to be a loan of money, and infected with usury, yet, as the defendant was entirely innocent of any participation in the original transaction,

§ 462. When there are conflicting laws which may be claimed to be applicable to a particular contract, that most favorable to the validity of the contract will, all other things being equal, be preferred. Parties will not be supposed to have meant to incorporate into a contract a law by which it would be made void if not fraudulent; and they will be supposed, in case of conflict, to have incorporated that law by which it would be made effective.<sup>1</sup> It is true that this opinion has been zealously disputed by Judge Story,<sup>2</sup> and in New York, where it was at one time adopted,<sup>3</sup> it has been recently questioned.<sup>4</sup> But supposing there is nothing in the document with which this construction conflicts, its acceptance is in harmony with the rule that "where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted."<sup>5</sup>

§ 463. Ordinarily it is the law of the place of performance that determines whether or no a contract is usurious;<sup>6</sup> and

and was without knowledge of any illegality therein at the time she accepted the transfer of this ground-rent to her by Denison as surviving trustee, the complainants have no equity for relief as against her, and that she cannot be affected by the usury that may be found to exist. But this position cannot for a moment be sustained. No principle is better settled than that usurious securities are not only affected as between the original parties to the transaction, but the illegality or taint of their inception follows and affects them in the hands of third persons, even though they be ignorant and innocent holders thereof. *Lloyd v. Scott*, 4 Pet. 228, and the authorities there quoted; *Andrews v. Poe*, 30 Md. 485, 488." But see 2 Pars. on Cont. 145.

<sup>1</sup> Pars. on Cont. ii. p. 584; Wh. Con. of L. § 507; *Cromwell v. Sac*, 96 U. S. 51; *Leavenworth Bk. v. Smoot*, 2 MacAr. 371; *Kellogg v. Miller*, 2 McCrary, 395; *Townsend v. Riley*, 46

N. H. 312; *Peck v. Mayo*, 14 Vt. 33; *Fisher v. Otis*, 3 Chand. 83; *Bolton v. Street*, 3 Cold. 31; *Depau v. Humphrey*, 8 Mart. N. S. 1; *Bullard v. Thompson*, 55 Tex. 313; and see cases cited *infra*, § 654; *supra*, § 337.

<sup>2</sup> Conf. of L. § 298.

<sup>3</sup> *Walworth, J., Chapman v. Robertson*, 6 Paige, 629.

<sup>4</sup> *Folger, J., Dickinson v. Edwards*, 77 N. Y. 578.

<sup>5</sup> *Erle, J., Norwich v. R. R.*, 4 E. & B. 397; and other cases cited Wh. on Ev. § 1249; *infra*, § 654.

<sup>6</sup> *Burge*, III. 774; *Phillimore*, IV. 515; *Guthrie's Savigny*, 208; *Henry on Foreign Law*, 43, note; 2 *Parsons on Contracts*, 5th ed. 584; *Westlake* (1880), § 211; *Story*, § 291; 2 *Kent, Com. Lect.* 39, p. 460; *Jones on Mortgages*, §§ 656 *et seq.*; *Cash v. Kennison*, 11 Vesey, 314; *Robinson v. Bland*, 2 Bur. R. 1077; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121; *Andrews v. Pond*, 13 Pet. 65; *Junction R. R. v. Bank*, 12

the place of performance, according to the better view, is the place where the money is invested. Suppose, for instance, it is to be used for the purchase of lands or the working of mines in Colorado, where interest may be fifteen per cent. The money may be lent in New York; the contract executed in New York; and the payment designated to be made in a New York bank. But, for all this, the place of performance is Colorado, where the money is employed. The interest is great, but so is the risk; and the lender should have full remuneration for this risk. Similar reasoning applies to the bonds executed by western railroads payable in Boston and New York. To declare such obligations usurious, because conflicting with the local law of the place of payment, would not only be a gross

Law of  
place of  
performance  
controls.

Wal. 226; *Miller v. Tiffany*, 1 Wal. 298; *Scudder v. Bank*, 91 U. S. 406; *Dodge in re*, 17 Bk. Reg. 504; *Houghton v. Page*, 2 N. H. 42; *Little v. Riley*, 43 N. H. 109; *French v. French*, 126 Mass. 360; *Phelps v. Kent*, 4 Day, 96; *Fanning v. Consequa*, 17 Johns. R. 511; 3 Johns. Ca. 610; *Hosford v. Nichols*, 1 Paige, R. 220; *Stewart v. Ellice*, 2 Paige, 604; *Potter v. Tallman*, 35 Barb. 182; *Balme v. Wombough*, 38 Barb. 352; *Jewell v. Wright*, 30 N. Y. 259; *Dickinson v. Edwards*, 77 N. Y. 578; *Cartwright v. Greene*, 47 Barb. 9; *Healy v. Gorman*, 3 Green (N. J.), 328; *Archer v. Dunn*, 2 W. & S. 327; *Wood v. Kelso*, 27 Penn. St. 241; *Mullen v. Morris*, 2 Barr, 85; *Irvine v. Barrett*, 2 Grant's Cas. 73; *Bowman v. Miller*, 25 Grat. 331; *Roberts v. McNeeley*, 7 Jones' Law (N. C.), 506; *Findlay v. Hall*, 12 Ohio St. 610; *Collins' Ins. Co. v. Burkam*, 10 Mich. 287; *Savary v. Savary*, 3 Iowa, 272; *Boyd v. Ellis*, 11 Iowa, 97; *Arnold v. Potter*, 22 Iowa, 194; *Newman v. Kershaw*, 10 Wis. 333; *Lapice v. Smith*, 13 La. R. 91; *Howard v. Brauner*, 23 La. An. 369; *Kennedy v. Knight*, 21 Wis. 340; *Hunt v. Hall*, 37 Ala. 702; *Cubbedge v. Napier*, 62 Ala. 518; *Granger's Ins. Co. v. Brown*, 57 Miss. 308; *Bolton v. Street*, 3 Cold. (Tenn.) 31; *Greenwade v. Greenwade*, 3 Dana, 497; *Young v. Harris*, 14 B. Mon. 556; *Butler v. Edgerton*, 15 Ind. 15; *Butler v. Myer*, 17 Ind. 77. In *Scudder v. Bank*, 91 U. S. 106, *Hunt, J.*, said: "So if a note, payable in New York, be given in the state of Illinois for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent. interest is allowed by the laws of the former state. *Miller v. Tiffany*, 1 Wal. 310; *Depau v. Humphrey*, 8 Mart. N. S. 1; *Chapman v. Robertson*, 6 Paige, 634; *Andrews v. Pond*, 13 Pet. 65." That the *lex fori* determines what interest is payable on a note when no place of payment is designated, see *Stickney v. Jordan*, 58 Me. 106. In *Consequa v. Fanning*, 3 John. Ch. 587, it was ruled by Chancellor Kent, that the Chinese law, relating to interest, would be applied in New York to a contract distinctively subject to that law. And see *supra*, § 351.

wrong to innocent and meritorious creditors, but a serious shock to national enterprise. Improvements in new countries would be slow, if capital should be exposed to such risks of forfeiture. It would be otherwise, however, if the rule be maintained that the place of performance (*i. e.*, the place that supplies the applicatory local law) is that where the money lent is to be used. This view, it should be added, is maintained by Bar,<sup>1</sup> and by a high French tribunal.<sup>2</sup> It has also the sanction of an eminent Scotch court.<sup>3</sup> Nor is this view unfamiliar to the Roman law. “*Usuræ vicem fructuum obtinent;*”<sup>4</sup> where the tree is, there properly is the fruit. It is true that this is regularly at the debtor’s domicil. But if he goes to a foreign land, and uses the money there, applying it by his labor and skill to the realization of foreign staples, then the law of the place where the money is used is that which determines the interest.<sup>5</sup> And this view derives support from parallel cases which the most eminent civilians have regarded as definitely settled.<sup>6</sup> But where a note is made in the state of A. and discounted and delivered in the state of B., as between the two, in case of conflict, the law of B. prevails.<sup>7</sup>

Mistake in fact will not avoid contract; otherwise as to mistake in law.

§ 464. Ignorance of fact, leading to a mistake in calculation, will not avoid a contract on account of usurious interest nominally charged.<sup>8</sup>

<sup>1</sup> Int. Priv. Recht, pp. 237, 238, 256.

<sup>2</sup> Jour. du droit int. privé, 1874, p. 128: see Fiore, § 265.

<sup>3</sup> Parker v. Royal Exchange Co., 8 D. 372; cited Guthrie’s Savigny, p. 204, note. See to same effect, Harvey v. Archibold, 1 Ry. & Moo. 104; S. C., 3 B. & C. 626; Young v. Godbe, 15 Wal. 562; Fitch v. Reiner, 1 Biss. 337; Phelps v. Kent, 4 Day, 96; Potter v. Tallman, 35 Barb. 182; Bank of Georgia v. Lewin, 45 Barb. 340; Bowen v. Bradley, 9 Abb. N. Y. Pr. 395; Findlay v. Hall, 12 Oh. St. 610; Arnold v. Potter, 22 Iowa, 194; Senter v. Bowman, 5 Heisk. 14; Duncan v. Helm, 22 La. An. 418. The tendency

of the French authorities is to hold that the rate of interest is to be determined by the law of the place where the money is to be employed. Jour. du droit int. privé, 1875, p. 354; Brocher, p. 363.

<sup>4</sup> L. 34, D. de usur. 22, 1.

<sup>5</sup> Hert. IV. 53; Seuffert, Comment. I. p. 254.

<sup>6</sup> Wh. Conf. of L. §§ 508, 672; Bar, p. 256.

<sup>7</sup> Andrews v. Pond, 13 Pet. 65; Tilden v. Blair, 21 Wall. 241; Upham v. Brimhall, 11 Metc. 526; Hiatt v. Griswold, 5 Fed. Rep. 573.

<sup>8</sup> Story on Cont. § 730, citing Glassfurd v. Laing, 1 Camp. 149; Gibson v.



§ 465. The rights given by the statutes are strictly personal. A stranger cannot be heard to avoid a contract on the ground that it is usurious.<sup>1</sup>

Stranger cannot avail himself of statute.

§ 466. When a contract is in itself valid, it is not affected by the fact that the lender receives, by a subsequent special arrangement, without remodeling the contract, an excess of interest.<sup>2</sup>

Contract not affected by subsequent usurious reception of interest.

§ 467. Supposing that a statute exists prohibiting the reception of interest beyond a fixed amount, and making void all contracts of loan in which the interest is beyond this amount, the statute cannot be evaded by disguising loans as sales. If the transaction is put in the shape of a sale with a right of redemption at a rate equivalent to a usurious penalty, then it will be regarded as a loan.<sup>3</sup> Interest beyond the legal standard, also, when paid for forbearance to call in money due, amounts to usury.<sup>4</sup> Nor, by technical subtleties, such as by antedating,<sup>5</sup> or by forcing depreciated currency or goods upon the borrower,<sup>6</sup> or by retaining a bonus,<sup>7</sup> or by masking the transaction in the form of discounts,<sup>8</sup> can the penalties of the statute be escaped.<sup>9</sup> Nor is an agreement not to reclaim usurious interest valid.<sup>10</sup> Nor can the usurious taint of a loan be got rid of by reconstructing or remoulding of the loan. No matter how numerous may be the reconstructions and re-

Statute cannot be evaded by disguising loan as sale nor by reconstructing loan.

Stearns, 3 N. H. 185; Bank of Utica v. Wager, 2 Cow. 720; and cases cited *supra*, §§ 197-8.

<sup>1</sup> Williams v. Tilt, 36 N. Y. 319; Stoney v. Ins. Co., 11 Paige, 635.

<sup>2</sup> Gray v. Fowler, 1 H. Bl. 462; Bank U. S. v. Waggoner, 9 Pet. 399; Ramsdell v. Soule, 12 Pick. 126; Bremen v. Hess, 13 Johns. 52; see Kilgore v. Emmit, 33 Oh. St. 410.

<sup>3</sup> Barker v. Vansommer, 1 Bro. C. C. 151; Waller v. Dalt, 1 Ch. Ca. 276; 1 Dick. 8; Scott v. Lloyd, 9 Pet. 418; Train v. Collins, 2 Pick. 145; Agricultural Bk. v. Bissell, 12 Pick. 586; Dayton v. Moore, 30 N. J. Eq. 543; Philip v. Kirkpatrick, Add. (Penn.) 124; Musgrove v. Gibbs, 1 Dall. 216; Evans

v. Negley, 13 S. & R. 218; Citizens' Land Co. v. Uhler, 48 Md. 455; Douglas v. McCheney, 2 Rand. Va. 109.

<sup>4</sup> Scott v. Lloyd, 9 Pet. 440; Manderson v. Bank, 28 Penn. St. 379.

<sup>5</sup> Witham v. Williams, 3 Green, N. J. 255.

<sup>6</sup> Tate v. Wellings, 3 T. R. 531; Bank of the Valley v. Stribling, 7 Leigh, 36.

<sup>7</sup> Whitney v. Tyler, 12 Met. 193; East River Bank v. Hoyt, 32 N. Y. 119.

<sup>8</sup> Powell v. Waters, 8 Cow. 669.

<sup>9</sup> See Auriol v. Thomas, 2 T. R. 52; Fitzsimmons v. Baum, 44 Penn. St. 32; Bachdell's App., 56 Penn. St. 386.

<sup>10</sup> Bosta v. Rheem, 72 Penn. St. 54.

modifications of a security, if the original consideration is tainted with usury, this taints all subsequent renewals of the indebtedness resting on such consideration.<sup>1</sup> But if the transaction be meant *bona fide* as a loan at interest, and the interest stipulated is legal, the contract is not avoided by the reservation to the lender of compensation for trouble he may have been put to, or may be put to in suing out the debt;<sup>2</sup> provided such compensation is not excessive.<sup>3</sup> Nor is compounding interest, at certain risks, in mercantile accounts, usury, when such is the arrangement between the parties;<sup>4</sup> nor does the advantage derived from differences of exchange amount to usury.<sup>5</sup> But all securities substituted for the original contract partake of its taint.<sup>6</sup>

§ 468. But while the statutes are to be applied to all loans, they are not to be stretched to extend to any transactions but loans.<sup>7</sup> They do not cover, therefore, annuities;<sup>8</sup> nor guarantees;<sup>9</sup> nor bottomry bonds;<sup>10</sup> nor partnership adventures;<sup>11</sup> nor *bona fide* sales of securities, no matter at what discount.<sup>12</sup>

§ 469. A court of equity will enjoin the collection of anything beyond the amount of the loan with legal interest.<sup>13</sup> But a borrower on a usurious contract cannot, in equity, have the transaction set aside unless he offer to repay to the lender whatever is actually due on the loan with legal interest.<sup>14</sup> But he

<sup>1</sup> Archer v. McCray, 59 Ga. 546; Wilkinson v. Wooten, 59 Ga. 584;

King v. Ins. Co., 57 Ala. 118.

<sup>2</sup> Lee v. Cass, 1 Taunt. 511; Scott v. Lloyd, 9 Pet. 440; Huling v. Drexel, 7 Watts, 126; Gray v. Brackenridge, 2 Pen. & W. 75; Beadle v. Munson, 30 Conn. 175.

<sup>3</sup> Large v. Passmore, 5 S. & R. 51; Grubb v. Brooks, 47 Penn. St. 485.

<sup>4</sup> Bevan *ex parte*, 9 Ves. 223; Eaton v. Bell, 5 B. & Al. 34; Wilcox v. Howland, 23 Pick. 167.

<sup>5</sup> Eagle Bank v. Rigney, 33 N. Y. 613; Eaton v. Bell, 5 B. & Al. 34; Wilcox v. Howland, 23 Pick. 167.

<sup>6</sup> Campbell v. Sloan, 62 Penn. St. 481.

<sup>7</sup> See Easterlin v. Rylander, 59 Ga. 292.

<sup>8</sup> Lawley v. Hooper, 3 Atk. 273.

<sup>9</sup> Larnego v. Gould, 2 Burr. 715.

<sup>10</sup> Long v. Wharton, 3 Keb. 304; see Jennings v. Ins. Co., 4 Binn. 244.

<sup>11</sup> Huston v. Moorhead, 7 Barr. 45.

<sup>12</sup> Wycoff v. Longhead, 2 Dall. 92; Gaul v. Willis, 26 Penn. St. 259; Fulwiler v. Jackson, 1 Phila. 145.

<sup>13</sup> Duquesne Bank's App., 74 Penn. St. 426.

<sup>14</sup> 1 Story Eq. Jur. 12th ed. § 301; Mason v. Gardiner, 4 Bro. C. C. 436;

may reclaim the excess paid over principal and legal interest.<sup>1</sup> —A lender on a usurious contract is precluded from suing as much in equity as in law, when barred by statute.<sup>2</sup> “If the lender,” says Judge Story, “comes into a court of equity seeking to enforce the contract, the court will refuse any assistance and repudiate the contract.”<sup>3</sup> But, on the other hand, if the borrower come into a court of equity, seeking relief against the usurious contract, the only terms upon which the court will interfere are, that the plaintiff will pay the defendant what is really and *bona fide* due to him, deducting the usurious interest;<sup>4</sup> and if the plaintiff do not make such an offer in his bill, the defendant may demur to it, and the bill be dismissed.<sup>5</sup> The ground of this distinction is, that a court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands may well be required to do equity. . . . But, in the other case, if equity should relieve the lender, who is plaintiff, it would be aiding a wrong-doer, who is seeking to make the court the means of carrying into effect a transaction manifestly wrong and illegal in itself.”<sup>6</sup> “And, upon the like principles, if the borrower has paid the money upon a usurious contract, courts of equity (and, indeed, courts of law also) will assist him to recover back the excess paid beyond principal and lawful

Hindle v. O'Brien, 1 Taunt. 413; Benfield v. Solomons, 9 Ves. 84; Rogers v. Rathbun, 1 John. Ch. 367; Fanning v. Dunham, 5 John. Ch. 142; Williams v. Fitzhugh, 37 N. Y. 444; Whitehead v. Peck, 1 Kelly, 140; Ballinger v. Edwards, 4 Ired. Eq. 449; Sporrer v. Eifler, 1 Heisk. 633. See Ahern v. Goodspeed, 72 N. Y. 108; Powers v. Chaplain, 30 N. J. Eq. 17; Lee v. Stiger, 30 N. J. Eq. 610.

<sup>1</sup> Browning v. Morris, 2 Cowp. 792; Bond v. Hays, 12 Mass. 36; Thomas v. Shoemaker, 6 W. & S. 179; Heath v. Page, 48 Penn. St. 130; Hopkins v. West, 83 Penn. St. 109.

<sup>2</sup> Fanning v. Dunham, 5 John. Ch. 142.

<sup>3</sup> Fanning v. Dunham, 5 John. Ch. 142.

<sup>4</sup> Williams v. Fitzhugh, 37 N. Y. 444; Whitehead v. Peck, 1 Kelly, 140; Ballinger v. Edwards, 4 Ired. Eq. 449.

<sup>5</sup> Mason v. Gardiner, 4 Bro. Ch. 436; Rogers v. Rathbun, 1 John. Ch. 367; Fanning v. Dunham, 5 John. Ch. 142; Ware v. Thompson, 2 Beasl. N. J. 66; Ruddell v. Ambler, 18 Ark. 369; Noble v. Walker, 32 Ala. 456.

<sup>6</sup> Story Eq. Jur. 12th ed. § 301.

interest; but not further. So, the borrower may maintain a bill to compel the giving up of securities left as collateral security for a usurious debt, although he might have a defence in an action at law."<sup>1</sup>—Under the Pennsylvania statute, the reservation of an illegal rate of interest does not prevent the recovery of the amount actually loaned with legal interest.<sup>2</sup> But under the act of congress, a national bank, by reserving usurious interest on a loan, forfeits the entire interest, but not the principal.<sup>3</sup>

§ 470. Under statutes avoiding usurious contracts, the question is not whether the usury was really received. It is enough, under the statutes, if the promise was exacted as a condition of the loan, though the payment was not actually made.<sup>4</sup> The penalty, however, imposed on illegal reception of usury cannot be imposed unless the reception be proved.<sup>5</sup> But when the illegal interest is received, the creditor cannot relieve himself by subsequently releasing the excess.<sup>6</sup>—The burden is on the party setting up usury to prove it.<sup>7</sup>—The taint must be brought home to the lender himself in order to infect the transaction. Thus, usury was held not to attach to a loan of \$17,000 on real estate security, from the fact that the agent negotiating the loan charged the borrower five per cent. for his services, and \$100 for the expenses of a journey from Chicago to Peoria in the specific business.<sup>8</sup> But exactions by an agent may implicate the principal wherever the principal ought to be cognizant of the facts.<sup>9</sup>

<sup>1</sup> Ibid., citing *Peters v. Mortimer*, 4 Edw. Ch. 279. That a borrower is not precluded from recovery by his complicity in an illegal transaction, see *supra*, § 353; *Vandyck v. Hewitt*, 1 East, 98; *Astley v. Reynolds*, 2 Str. 916.

<sup>2</sup> *Philadelphia, etc. R. R. v. Lewis*, 33 Penn. St. 33.

<sup>3</sup> *Farm. and Mech. Bank v. Dearing*, 91 U. S. 29; *Brown v. Bank*, 72 Penn. St. 209; *Lucas v. Bank*, 78 Penn. St. 228; *Overholt v. Bank*, 82 Penn. St. 490.

<sup>4</sup> *Clark v. Badgley*, 3 Halst. 233; *Hammond v. Hopping*, 13 Wend. 505.

<sup>5</sup> *Maddock v. Hammett*, 7 T. R. 184; *Com. v. Frost*, 5 Mass. 53; *Oyster v. Longnecker*, 16 Penn. St. 269.

<sup>6</sup> *Kirkpatrick v. Houston*, 4 W. & S. 11.

<sup>7</sup> *Hotel Co. v. Wade*, 97 U. S. 50; *Wilson v. Kirby*, 88 Ill. 566.

<sup>8</sup> *Ballinger v. Bourland*, 87 Ill. 513; see *Van Wyck v. Walters*, 16 Hun, N. Y. 209; *Marshalltown Bk. v. Bonawitz*, 47 Iowa, 322.

<sup>9</sup> *Cheney v. Eberhardt*, 8 Neb. 423. See *New England Co. v. Hendrickson*, 15 Cent. L. J. 132.

## XII. TRADING WITH ENEMY AND BREACH OF NEUTRALITY.

§ 473. At common law, contracts of trade with a public enemy are void.<sup>1</sup> Even a charter-party undertaking to load a cargo in a foreign country is avoided by war being declared by the country of the contract with the country of the port of loading.<sup>2</sup> And the courts of one belligerent state will refuse to enforce any business contracts between the citizens of such state and the citizens of the other belligerent state, no matter through what agencies such contracts may have been negotiated. The rule is that there must be absolute suspension of business between the citizens of one belligerent state and the citizens of another belligerent state.<sup>3</sup> A partnership, also, is dissolved by war intervening between two countries, of one of which one partner is subject and of the other of which another partner is subject.<sup>4</sup> And a bill drawn by an alien enemy on a subject of the state in whose courts the suit is brought, and endorsed by the payee, such payee being a subject residing in the enemy's country, will be held void as an act of trade between subjects of belligerent states.<sup>5</sup> A British subject, domiciled in a for-

Trading  
with public  
enemy void  
at common  
law.

<sup>1</sup> *Abdy's Kent*, 294; *Wh. Con. of L.* § 497; *Potts v. Bell*, 8 T. R. 561; *Esposito v. Bowden*, 7 E. & B. 763; *Barrick v. Buba*, 2 C. B. N. S. 563; *Scholefield v. Eichelberger*, 7 Pet. 586; *U. S. v. Grossmayer*, 9 Wall. 72; *Kershaw v. Kelsey*, 100 Mass. 561; *Stevenson v. Payne*, 109 Mass. 378; *Griswold v. Waddington*, 15 Johns. 57; S. C., 16 Johns. 438; *Hyatt v. James*, 2 Bush, 463; *Graham v. Merrill*, 5 Cold. 622; *Perkins v. Rogers*, 35 Ind. 124; *Shacklett v. Polk*, 51 Miss. 378; *Rice v. Shook*, 27 Ark. 137; *Hennan v. Gilman*, 20 La. An. 241; and see *supra*, §§ 94-319.

<sup>2</sup> *Esposito v. Bowden*, 7 E. & B. 763; *supra*, §§ 305, 319.

<sup>3</sup> *Supra*, §§ 305, 319; *Wheat. Int. Law*, 556; *Anthon v. Fisher*, 2 Doug. 649; *Brandon v. Nesbitt*, 6 T. R. 23;

*Albrecht v. Sussman*, 2 V. & B. 323; *Montgomery v. U. S.*, 15 Wall. 395; *Crawford v. The William Penn*, 3 Wash. C. C. 484; *Philips v. Hatch*, 1 Dill. 571. A contract by a citizen to observe neutrality with an enemy may be valid when it is out of the power of his own government to protect him. *Miller v. The Resolution*, 2 Dall. 10.

<sup>4</sup> *Pollock*, *Wald's ed.* 282; *Matthews v. McStea*, 91 U. S. 7; *Hubbard v. Matthews*, 54 N. Y. 43; *Griswold v. Waddington*, 15 Johns. 57; S. C., 16 Johns. 438; *McStea v. Matthews*, 50 N. Y. 166; *supra*, §§ 305, 319.

<sup>5</sup> *Willison v. Patteson*, 7 Taunt. 439. See *Williams v. Bank*, 2 Woods, 501; *Woods v. Wilder*, 43 N. Y. 164. See 1 Ch. on Con. 11th Am. ed. 259; *supra*, §§ 305-19.

eign country at war with Great Britain, cannot, it is held in England, sue in English courts.<sup>1</sup> It is otherwise as to a British subject who is a prisoner of war in an enemy's country.<sup>2</sup>—It has been held by the supreme court of the United States that an assignment of shares in a company originally formed to supply aid to a belligerent is not of itself necessarily void.<sup>3</sup> But bonds issued by the late Confederate government, general or state, as war bonds, do not constitute a lawful consideration for a promissory note, though those bonds were used as currency.<sup>4</sup>—A contract, however, which has been executed, will not be overhauled because its consideration, in whole or in part, was aid to a public enemy.<sup>5</sup> This distinction holds as to partnerships as well as to other business conditions. “After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the parties has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them, on the ground of the illegal character of the original contract.”<sup>6</sup>

§ 474. The general rule that no contracts with public enemies can be enforced, is applicable to all cases of belligerency; and hence, belligerent insurgents, when their belligerency is recognized by the parent state, are put in this respect in the category of public enemies.<sup>7</sup> *A fortiori* is this the case with contracts to furnish goods to support a rebellion. Aside from the reason that such contracts are void as made with a public enemy, they are void as contributing to an indictable offence.<sup>8</sup> A note, therefore,

Rule applicable to belligerent insurgents.

<sup>1</sup> McConnell v. Hector, 3 B. & P. 113; Roberts v. Hardy, 3 M. & S. 533; and other cases cited *supra*, §§ 94, 305, 319.

<sup>2</sup> Willison v. Patteson, 7 Taunt. 449.

<sup>3</sup> McBlair v. Gibbes, 17 How. 232.

<sup>4</sup> Hanauer v. Woodruff, 15 Wall. 439.

<sup>5</sup> *Supra*, § 352; Robinson v. Ins. Co., 42 N. Y. 54; Clements v. Yturria, 81 N. Y. 285; Pfeuffer v. Maltby, 54 Tex. 454.

<sup>6</sup> Brooks v. Martin, 2 Wall. 70; Planters' Bank v. Union Bk., 16 Wall. 483; Lewis v. Alexander, 51 Tex. 590.

<sup>7</sup> Dean v. Nelson, 10 Wall. 158; Hanauer v. Doane, 12 Wal. 342; Portis v. Green, 25 Ark. 376.

<sup>8</sup> Texas v. White, 7 Wall. 700; Hanauer v. Doane, 12 Wall. 342; Waitzfelder v. Kahnweiler, 56 Barb. 300; see White v. Hart, 13 Wall. 646; McKesson v. Jones, 66 N. C. 258; Cronly v. Hall, 67 N. C. 9; see Wh. Cr. L. 8th ed. § 1901, where this topic is discussed in detail.

given in consideration of the payee acting as the payor's substitute in the Confederate army is void.<sup>1</sup>—Contracts which involve the reception of Confederate money are void as giving credit to the Confederate treasury.<sup>2</sup>

§ 475. In England it is within the power of the crown to grant a valid license to trade with a public enemy.

"The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war, and its license for such purpose ought to receive the most liberal construction."<sup>3</sup> But a license to trade as subjects will not be construed as containing authority to trade as agents of a public enemy.<sup>4</sup> The license is limited to its specific objects,<sup>5</sup> nor can it be transferred to other parties.<sup>6</sup>

License  
validates  
trade with  
enemy.

§ 476. A contract between the citizens of two friendly states is suspended by a declaration of war between the two states, so that there can be no suit in either state unless by license of the state in which the suit is brought.<sup>7</sup> But an order from the proper domestic authorities may reserve for specific periods and under certain conditions the right of suit.<sup>8</sup> And when the contract is of a character that its suspension during war destroys its efficiency permanently, then it is vacated and dissolved by the war.<sup>9</sup>

Contract  
suspended  
during hos-  
tilities.

<sup>1</sup> *Chancely v. Baily*, 37 Ga. 532.

<sup>2</sup> *Martin v. Wallace*, 40 Ga. 52.

<sup>3</sup> Per cur. in *Usparicha v. Noble*, 13 East, 340; see *Kensington v. Inglis*, 8 East, 273; *Patton v. Nicholson*, 3 Wheat. 207; *Crawford v. The William Penn*, Peters C. C. 106.

<sup>4</sup> *Leake*, 2d ed. 748; *Mennett v. Bonham*, 15 East, 477.

<sup>5</sup> *Keir v. Andrade*, 6 Taunt. 498; *Clark v. Ins. Co.*, 1 Story R. 128.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Abbott on Ship.*, 9th ed. 485; *O'Mealey v. Wilson*, 1 Camp. 482; *Reid v. Hoskins*, 4 E. & B. 979; 6 E. & B. 953; *McConnell v. Hector*, 3 B. & P. 113; *Boussmaker ex parte*, 13 Ves. 71;

*Esposito v. Bowden*, 7 E. & B. 763; *Johnson v. Falconer*, 2 Paine, 639; *Crawford v. The William Penn*, 3 Wash. C. C. 484; *Stiles v. Easley*, 51 Ill. 275; *Seymour v. Bailey*, 66 Ill. 288. As to alien enemies, see *supra*, § 94. As to effect of embargo, see *supra*, § 305. As to effect of temporary necessity, see *supra*, § 321.

<sup>8</sup> *Clementson v. Blessig*, 11 Ex. 135; *Matthews v. McStea*, 91 U. S. 7. The effect of war on a policy of life insurance is discussed in *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, and other cases cited *Wald's Pollock*, 282.

<sup>9</sup> *Esposito v. Bowden*, 7 E. & B. 763; *Geipel v. Smith*, L. R. 7 Q. B. 404.

Insurance  
of enemy's  
ships and  
goods  
illegal.

§ 477. Insurances either of the ships of public enemies, or of goods which are the subjects of contraband trade, are illegal, as tending to encourage the enemy's trade.<sup>1</sup>

Alien ene-  
mies can-  
not sue dur-  
ing the war.

§ 478. Even supposing a contract continues in force during a war, an alien enemy cannot, without license, sue on it,<sup>2</sup> though when sued, he may appear, if not otherwise disabled, and make defence.<sup>3</sup> Permission to remain in the country, however, gives ground to infer tacit license to do business.<sup>4</sup>

Contracts  
for breach  
of neutral-  
ity laws  
void.

§ 479. A contract for the breach of neutrality laws, adopted by the *lex fori*, is void.<sup>5</sup> English courts, also, it has been held, will refuse to sustain suits brought on contracts to raise money to support an insurrection against a state in amity with Great Britain.<sup>6</sup> It should be remembered, as is elsewhere shown,<sup>7</sup> that neutrality, as defined by the law of nations, and neutrality, as defined by local law, are far from being convertible. A government (as was the case with our own government during the Napoleonic wars, and with the British government during our late civil war) may say: "the law of nations in this respect imposes on us greater obligations than we can impose on our subjects, but this does not affect our liability for breaches of neutrality by our subjects which we either could not or would not prevent." On the other hand, a state may impose on its subjects limitations more strict than those imposed by the law of nations. In the latter case, all contracts subject to the local law, which violate that law, will be held void by the

<sup>1</sup> Leake, 2d ed. 747; Phillips on Ins. §§ 147, 223; Brandon v. Nesbitt, 6 T. R. 23; Bristow v. Towers, 6 T. R. 35; Vandyck v. Hewitt, 1 East, 96; Furtado v. Rodgers, 3 B. & P. 191; Semmes v. Ins. Co., 13 Wall. 158; Delmas v. Ins. Co., 14 Wall. 661.

<sup>2</sup> *Infra*, § 97; Wh. Con. of L. § 737; McConnell v. Hector, 3 B. & P. 113; U. S. v. Isaac Hammett, 10 Pitts. L. J. (O. S.) 97; Crawford v. The William Penn, 3 Wash. C. C. 484; Otteridge v.

Thompson, 3 Cranch C. C. 108; Kershaw v. Kelsey, 100 Mass. 561; Sanderson v. Morgan, 39 N. Y. 231; Perkins v. Rogers, 35 Ind. 124.

<sup>3</sup> McVeigh v. U. S., 11 Wall. 259; Seymour v. Bailey, 66 Ill. 288.

<sup>4</sup> Wells v. Williams, 1 Salk. 46; Boulton v. Dobree, 2 Camp. 163; *supra*, § 475.

<sup>5</sup> Wh. Cr. L. 8th ed. § 1901.

<sup>6</sup> De Wütz v. Hendricks, 2 Bing. 314.

<sup>7</sup> Wh. Cr. L. 8th ed. § 1901.



courts of the state enacting the prohibition.—Whether contracts violating the laws of nations will be held good when not violating local law, may depend upon local legislation. But if the law of nations is part of our common law, which is now the prevalent opinion,<sup>1</sup> and if the question be whether a court subject to the common law will enforce a contract contravening the law of nations, the answer should be in the negative. The object, however, of the contract, to make it illegal, must bring the party furnishing the illegal aid into privity of contract with the belligerent to whom it is unlawful for him to furnish aid. Contracts to sell naval ammunition will not be made illegal by the fact that the party selling foresees that they will find their way into a cruiser designed for a belligerent sovereign. If this invalidated a contract, few contracts for naval supplies would be valid.<sup>2</sup> Nor, according to the better opinion, are contracts by neutrals to supply munitions of war to a belligerent illegal.<sup>3</sup> But it is a breach of neutrality for a neutral to recruit soldiers and fit out cruisers for belligerent service,<sup>4</sup> and to establish a system of coal-ing for belligerent steamers.<sup>5</sup>

§ 480. A contract to run a foreign blockade is not illegal, and, when limited to matters of trade, will be enforced in the courts of a neutral state.<sup>6</sup>

Contracts to run foreign blockade not illegal.

### XIII. COMPOUNDING OFFENCES.

§ 483. Not only is it an indictable offence to compound a felony,<sup>7</sup> but all contracts to abate or compromise criminal offences of any class are held void as against the policy of the law. “It is to the interest of the public that the suppression of a prosecution should not be made matter of private bargain.”<sup>8</sup>

Contracts to compound offences void.

<sup>1</sup> Wh. Con. of L. § 1.

<sup>2</sup> Wh. Cr. L. 8th ed. § 1903; see *supra*, § 343, where this topic is more fully discussed.

<sup>3</sup> Bluntschli, § 764, and authorities cited in Wh. Cr. L. 8th ed. § 1903.

<sup>4</sup> Wh. Cr. L. 8th ed. § 1904.

<sup>5</sup> *Ibid.*, § 1907.

<sup>6</sup> Kent, iii. 267; Wh. Con. of L. § 496 a; *Chavasse ex parte*, 4 D. J. S. 655; *The Helen*, L. R. 1 Ad. & Ec. 1.

<sup>7</sup> Wh. Cr. L. 8th ed. § 1559.

<sup>8</sup> *Clubb v. Hutson*, 18 C. B. N. S. 414, by Erle, C. J.; and to same effect see remarks of Fry, J., in *Whitmore v. Farley*, 43 L. T. N. S. 192; S. P. Ward

This rule has been held to apply to an agreement to acknowledge the signature of a forged bill in consideration of the holder forbearing to prosecute the forger;<sup>1</sup> to an agreement for the compromise of a prosecution for an offence subjecting the party to a pecuniary forfeiture;<sup>2</sup> to taking security for the amount of forged bills with an understanding that the prosecution should not be pressed;<sup>3</sup> to an agreement to settle a riotous assault involving a forcible interference with a public officer when executing his duties;<sup>4</sup> to a note given on consideration not to prosecute a larceny;<sup>5</sup> to an agreement of which the consideration is to abandon prosecution for embezzlement;<sup>6</sup> to an agreement to suspend extradition proceedings against a fugitive;<sup>7</sup> to a bond given in consideration of the obligee not proceeding to prosecute a charge of perjury;<sup>8</sup> to a promissory note given in consideration of not prosecuting a charge of obtaining money on false pretences;<sup>9</sup> and to a mortgage given by a wife in consideration of a prosecution for false pretences against the husband being withdrawn.<sup>10</sup>—

*v. Allen*, 2 Met. 57; *McMahon v. Smith*, 47 Conn. 221; *Von Windisch v. Klaus*, 46 Conn. 433; *People v. Buckland*, 13 Wend. 592; *Den v. Moore*, 2 South. 470; *Roll v. Raguet*, 4 Ohio, 400; *Henderson v. Palmer*, 71 Ill. 579; *Wisner v. Bardwell*, 38 Mich. 278; *Chandler v. Johnson*, 39 Ga. 85; *Baker v. Farris*, 61 Mo. 389; *Snyder v. Willey*, 33 Mich. 483.

<sup>1</sup> *Brook v. Hook*, L. R. 6 Ex. 89. It has been held, however, not compounding felony for a person whose name has been forged to adopt the signature and give money to the forger to enable him to pay the note forged. *Caldecott ex parte*, L. R. 4 Ch. D. 150.

<sup>2</sup> *Edgcombe v. Rodd*, 5 East, 294.

<sup>3</sup> *Williams v. Bayley*, L. R. 1 H. L. 200.

<sup>4</sup> *Keir v. Leeman*, 9 Q. B. 371; see *Williams v. Bayley*, L. R. 1 H. L. 200.

<sup>5</sup> *Supra*, § 151 *a*; *Com. v. Pease*, 16 Mass. 91; *Chandler v. Johnson*, 39 Ga. 89; and see generally *Whitmore*

*v. Farley*, 43 L. T. N. S. 192; *Shaw v. Reed*, 30 Me. 105; *Taylor v. Jaques*, 106 Mass. 291.

<sup>6</sup> *Fivaz v. Nichols*, 2 C. B. 501; *Critchley ex parte*, 3 D. & L. 527; *Shaw v. Reed*, 30 Me. 105. And so as to embezzlement by bailee, constituting statutory larceny. *Whitmore v. Farley*, *infra*, § 484.

<sup>7</sup> *Dixon v. Olmstead*, 9 Vt. 310.

<sup>8</sup> *Rawlings v. Coal Consumers' Co.*, 43 L. J. M. 111; *Hinds v. Chamberlain*, 6 N. H. 225.

<sup>9</sup> *Clubb v. Hutson*, 18 C. B. N. S. 414; *Shaw v. Spooner*, 9 N. H. 197; see *Shaw v. Reed*, 30 Me. 105.

<sup>10</sup> *McMahon v. Smith*, 47 Conn. 221. And see generally as sustaining the text, *Shaw v. Reed*, 30 Me. 105; *Shaw v. Spooner*, 9 N. H. 197; *Bowen v. Buck*, 28 Vt. 308; *Pierce v. Kibbee*, 51 Vt. 559; *Com. v. Johnson*, 3 Cush. 454; *Sharon v. Gager*, 46 Conn. 189; *Von Windisch v. Klaus*, 46 Conn. 433; *National Bank of Oxford v. Kirk*, 90

To sustain a charge of compounding crime, it must appear that there was an agreement not to prosecute, and by a preponderance of evidence that a crime was committed.<sup>1</sup>—It is important here to observe the difference in this relation between the defence of duress and that of compounding crime. To sustain the defence of duress it is not necessary to show that the party making the promise was guilty of any wrong.<sup>2</sup> To sustain the defence that the consideration was the compounding of a crime, it is necessary to show by a preponderance of proof that a crime was committed. But, without such proof, an agreement by parties to settle a criminal prosecution is invalid.<sup>3</sup>—A mortgage-note given in consideration of compounding a prosecution for forgery is bad in the hands of an assignee for value, but with notice;<sup>4</sup> though it is otherwise as to party without notice.<sup>5</sup>—An agreement, also, not to expose immoral conduct has been held void.<sup>6</sup>—Money paid inadvertently, and not with criminal intent, to compound a prosecution, cannot be recovered back.<sup>7</sup>—A forged endorsement cannot be ratified, this being against public policy;<sup>8</sup> though a party may estop himself from setting up forgery.

Penn. St. 49; *Shisler v. Vandike*, 92 Penn. St. 447; *Roll v. Raguet*, 4 Ohio, 400; 7 Ohio, 76; *Buck v. Bank*, 27 Mich. 293; *Fay v. Oatley*, 6 Wis. 42; *Kimbrough v. Lane*, 11 Bush, 556; *Gardner v. Maxey*, 9 B. Mon. 90; *Corley v. Williams*, 1 Bailey, 588; *Bell v. Wood*, 1 Bay, 249; *Robinson v. Cranshaw*, 2 St. & P. 276; *Averbeck v. Hall*, 14 Bush, 505; *Ozanne v. Haber*, 30 La. An. Part II. 1384. And see *supra*, § 151 *a*, for cases of contracts void from the duress so applied.

<sup>1</sup> *Swope v. Ins. Co.*, 93 Penn. St. 251; *Catlin v. Henton*, 9 Wis. 476. In *Nat. Bk. v. Kirk*, 90 Penn. St. 49, "the defendant offered testimony tending to show that he was induced to give the note in consequence of the threatened prosecution of his son for forgery, coupled with the representation of one of the officers of the bank

that if the note was given it would probably be paid by the son, and 'no one would then know anything about' the forgery. This tended to show an agreement on the part of the bank not to prosecute, and the question was accordingly submitted to the jury." *Sterrett, J.*, 93 Penn. St. 254.

<sup>2</sup> *Supra*, §§ 148 *et seq.*

<sup>3</sup> *Supra*, § 151; *infra*, § 484.

<sup>4</sup> *Pierce v. Kibbee*, 51 Vt. 559; *Smith v. Bank*, 9 Neb. 31.

<sup>5</sup> *Ibid.*; *supra*, § 146.

<sup>6</sup> *Brown v. Brine*, L. R. 1 Ex. D. 5; see *supra*, § 415.

<sup>7</sup> *Mapleback in re*, L. R. 4 C. D. 150; *Butt ex parte*, 46 L. J. B. 14; 13 Cox C. C. 374, cited *Leake*, 2d ed. 928; *infra*, § 741.

<sup>8</sup> *Shisler v. Vandike*, 92 Penn. St. 447.

§ 484. It used to be said that there was a distinction in this respect between felonies and misdemeanors. But this can be no longer regarded as the law. (1) In many jurisdictions the distinction between felonies and misdemeanors is abolished, and in all jurisdictions it is regarded as artificial, and even where retained, its abandonment is a mere question of time. (2) There are many misdemeanors whose compounding militates far more against public policy than does the compounding of some felonies. It is more important, for instance, that conspiracies to murder, conspiracies to rob, and treasonable conspiracies, should be prosecuted by the state unswayed by private interest, and that private hands should be kept off such prosecutions, than that there should be this rigor manifested in all prosecutions for larceny. If no agreement whose consideration is the holding back a prosecution for larceny should be held valid, there is no offence, touching the public as such, whose prosecution we can consistently allow to be a matter of private arrangement. To adopt the language of Baggallay, L. J., in 1881,<sup>1</sup> "it is immaterial whether the charge which was attempted to be compromised was a felony or only a misdemeanor."<sup>2</sup> The proper view is that it is a criminal

<sup>1</sup> *Whitmore v. Farley*, 45 L. T. N. S. 101. See *supra*, § 345.

<sup>2</sup> In the same case *Lush, L. J.*, said: "Although the offence here was a felony, it would not matter if it were a misdemeanor. There are, no doubt, certain cases, as that of an assault, where the parties may compromise the offence without being guilty of an illegal act. But this does not apply to misdemeanors of a serious kind. Embezzlement is only a misdemeanor, yet it is a criminal offence to compromise a prosecution for embezzlement. The principle has been stated by Lord Abinger, C. B., in the case of *Davis v. Holding* (1 M. & W. 159). The court there held that an agreement which was illegal and void, as being against the general policy of the law, should

not be enforced, and applied the doctrine to an agreement to abandon a fiat in bankruptcy. The doctrine has also been applied in cases where a debtor has entered into a bargain with certain creditors not to oppose him in obtaining a composition with the general body of his creditors. It is a well-established doctrine that an agreement to forego public rights is an illegal agreement. Whether the felony could have been proved here or not, there is no doubt that a criminal charge was made, and the prosecutrix could not legally withdraw it." See to same general effect *Wh. Cr. L.* 8th ed. §§ 21, 22, 1559; *Ball ex parte, Shepherd in re*, L. R. 10 Ch. D. 667; *Keir v. Leeman*, 9 Q. B. 371; *Hinesburgh v. Sumner*, 9 Vt. 23; *Com. v. Pease*, 16

offence to compound, for a personal benefit, a misdemeanor involving an offence against public order; for this would be a corrupt usurpation and prostitution by an individual of a high prerogative of the state. And, whatever we may think on this point, it is settled that no contract will be sustained the consideration of which is the refusal by an individual to aid in prosecuting an offence whose prosecution is a matter of interest to the state. To induce a witness to suppress his testimony is indictable;<sup>1</sup> *a fortiori* is this the case with an agreement to suppress a prosecution as a whole, or to use it as means of private gain; and a contract will not be sustained whose consideration is the commission of an indictable offence. As illustrating this distinction may be cited a case, already noticed, in which it was held that while a merely private and secret assault may be settled by the parties, it is otherwise with an assault connected with a breach of the public peace, and with resistance to an officer in discharge of his duties.<sup>2</sup>

§ 485. The approval of the magistrate before whom the case was heard cannot legalize such an agreement, however much it might relieve the parties to the compounding from a criminal prosecution. Thus, in a case tried in London in 1881, D., having been arrested at the instance of P., on the charge of having committed the offence of larceny as a bailee, was brought up before a magistrate and remanded. D.'s wife then induced P. to withdraw from the prosecution on D.'s wife agreeing to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names

Approval of magistrate does not legalize contract.

Mass. 91; *McMahon v. Smith*, 47 Conn. 221; *People v. Buckland*, 13 Wend. 592. See for effect of duress in vacating contract under such circumstances, *supra*, § 151 *a*.

<sup>1</sup> Wh. Cr. L. 8th ed. § 1333.

<sup>2</sup> *Keir v. Leeman*, 9 Q. B. 371; see *Davies v. Ins. Co.*, L. R. 8 Ch. D. 469. In *Whitmore v. Farley*, 43 L. T. (N. S.) 192, Fry, J., said: "Whether, then, the distinction which appears to me to prevail between cases of felony and

cases of misdemeanor, be or be not real, and if I merely look at this case as one of an offence, without specifying to what category it belongs, I will ask myself is it an offence of a strictly private character, or is it one in which the public have an interest." That the proper prosecuting officer may compel a prosecutor to elect between a civil and a criminal suit, see Wh. Cr. Pl. & Pr. § 384; 2 Burr. 270. See generally *supra*, § 345.

of the solicitors of the parties. D. being again brought before the magistrate, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. D.'s wife having refused to perform her agreement, P. brought an action to enforce the charge, and D.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her. It was held by James, Baggallay, and Lush, L. JJ. (affirming the decision of Fry, J.), that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for delivery of the deeds.<sup>1</sup>—"The agreement," said James, L. J., "would not have been legal if the lord chief justice, the lord high chancellor, and all the judges of the court of appeal had consented to it."

§ 486. There are many unlawful acts which may be proceeded against both criminally and civilly. Thus, an assault and battery may be sued for as a trespass on the person, entitling to damages, or as an offence against the public peace; a cheat may be sued on as deceit, entitling the party injured to damages, or as either a cheat at common law, or an offence under the false pretence statutes, exposing the offender to conviction in a criminal court. If we were to say that no case could be compromised which involves a criminal offence, we would not only say that litigation to the bitter end is imperative in multitudes of cases in which compromises are on general grounds eminently proper, but we would almost indefinitely extend litigation by holding parties who do not in such cases prosecute liable to criminal prosecutions themselves. It is essential, therefore, to keep criminal and civil prosecutions strictly separate, in all cases in which both may be instituted for the same act. In England this is in part effected, so far as concerns felonies, by the rule that a party who fails to prosecute for the felony in a criminal court, when such prosecution is within his power, is precluded from suing in a civil

Settlement  
of private  
suit not  
precluded  
by the fact  
that a crim-  
inal prose-  
cution lies  
for the  
same act.

<sup>1</sup> *Whitmore v. Farley*, 45 L. T. N. S. 99; *aff. S. C.*, 43 L. T. N. S. 192; *supra*, § 151 *a*.

court the offender for damages incurred through the felony.<sup>1</sup> In this country, however, the English rule is not properly applicable in those jurisdictions in which the power of prosecution is vested exclusively in public officers;<sup>2</sup> and neither in this country nor in England has the rule been supposed to apply to misdemeanors.<sup>3</sup> Assuming, therefore, that there is now no case in which the fact that a criminal prosecution can be brought for an act sued upon in a civil court is ground for abating the suit, it follows that there is no reason why such a suit, if begun, should not be settled by compromise, supposing the settlement does not imply the illegal stifling of the prosecution. "In all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle the private damage in any way he may think fit."<sup>4</sup> This is clearly the case after convictions for assault, in which cases the court trying the criminal offence will be influenced, in imposing sentence, by considering how much the offender had to pay, and how much the prosecutor received.<sup>5</sup> And a bond conditioned for the abatement of a public nuisance, in consideration of the abandonment of a prosecution for the nuisance, has been held valid;<sup>6</sup> and the same view has been applied to prosecutions for infringing trade-marks;<sup>7</sup> to bastardy prosecutions;<sup>8</sup> to prosecutions for

<sup>1</sup> Ball *ex parte*, L. R. 10 Ch. D. 667; Wh. Cr. Pl. and Pr. 8th ed. § 453; Wellock v. Constantine, 2 H. & C. 146; London Law Times, Apr. 12, 1879.

<sup>2</sup> See Wh. Cr. Pl. and Pr. 8th ed. § 453.

<sup>3</sup> Ball *ex parte*, *ut supra*; Fissington v. Hutchinson, 15 L. T. N. S. 390; Boody v. Keating, 4 Me. 167; Nowlan v. Griffin, 68 Me. 235; Boston, etc. R. R. v. Dana, 1 Gray, 83.

<sup>4</sup> Per cur. Keir v. Leeman, 9 Q. B. 395.

<sup>5</sup> Baker v. Townsend, 7 Taunt. 422; Beeley v. Wingfield, 11 East, 46; Elworthy v. Bird, 2 Sim. & S. 372.

<sup>6</sup> Fallowes v. Taylor, 7 T. R. 475.

This, however, is questioned in Keir v. Leeman, 9 Q. B. 394.

<sup>7</sup> Fisher v. Apollonaris Co., L. R. 10 Ch. 297.

<sup>8</sup> Wh. Cr. L. 8th ed. § 1741; Holcomb v. Stimpson, 8 Vt. 144; Howe v. Litchfield, 3 Allen, 443; Maurer v. Mitchell, 9 W. & S. 69, overruling Shenk v. Mingle, 13 S. & R. 29; Maxwell v. Campbell, 8 Oh. St. 265; Burgen v. Straughen, 7 J. J. Marsh. 583; Stephens v. Spiers, 25 Mo. 386. "No reason is perceived why a person may not receive from one guilty of a private injury satisfaction for such injury, and the fact that this is received while the person may be in confinement does not

assault and battery;<sup>1</sup> though when such prosecutions are used to extort money, all securities thereby obtained are void.<sup>2</sup> And where merely private injury has been effected, the party injured may recover on securities given to him to indemnify him for his losses, though a part consideration may have been his forbearance to prosecute criminally for these injuries, on which a criminal prosecution might have been sustained.<sup>3</sup>—In a case in 1882 in Georgia, D.'s widow having instituted a suit against K., under the Georgia statute, for damages sustained by her through her husband's killing by K., K. gave her his notes in consideration of the settlement of the suit. It was held that the notes were valid and the consideration good, whether K. was actually concerned in the killing of D. or not.<sup>4</sup>—But wherever the consideration is the illegal abandonment of a criminal prosecution, the contract fails. Thus, where a party charged with cheating at cards gave a promissory note to the party detecting him in consideration of the offence not being prosecuted, a decree was entered requiring the note to be surrendered as improperly obtained.<sup>5</sup> Such abandonment may, under local law, be with the assent of the prosecuting attorney, and if so, it does not invalidate a contract of which it is the consideration.<sup>6</sup> But, unless the settlement is authorized by law, it vitiates any contract of which it is the consideration.

§ 487. The question of the legality of settlements of this class is largely dependent upon the local law in reference to the discontinuance of prosecutions. In some jurisdictions, the right to enter a *nolle prosequi* belongs to the duly authorized prosecuting attorney; in some to this officer with the approval of the

Question  
dependent  
upon local  
law of  
*nolle prosequi*.

render the transaction illegal." Craig, J., *Heaps v. Dunham*, 95 Ill. 588, citing *Schommer v. Farwell*, 56 Ill. 542.

<sup>1</sup> *Price v. Summers*, 2 South. 578; *Rushworth v. Dwyer*, 1 Phila. 26; see *Gray v. Seigler*, 2 Strobb. 117. That notes given to compromise a prosecution of assault and battery, when a public offence, are void, see *Jones v. Rice*, 18 Pick. 440; *Vincent v. Groom*, 1 Yerg. 430.

<sup>2</sup> See *Corley v. Williams*, 1 Bailey, 588; *supra*, § 151.

<sup>3</sup> *Plumer v. Smith*, 5 N. H. 553; *Stone v. Hooker*, 9 Cow. 154.

<sup>4</sup> *Dodson v. McCauley*, 62 Ga. 130.

<sup>5</sup> *Osbaldiston v. Simpson*, 13 Sim. 513.

<sup>6</sup> *Price v. Summers*, 2 South. 578; *Maurer v. Mitchell*, 9 W. & S. 69; *Robinson v. Cranshaw*, 2 St. & Port. 276.



court.<sup>1</sup> Where the right of discontinuing prosecutions is thus defined by law, it cannot but be held that a settlement of a prosecution by a private individual is not only inoperative, but is not a consideration on which a contract can be sustained. On the other hand, it is equally clear that the proper public officer may impose as a condition of a *nolle prosequi* that the defendant should reimburse, as far as is practicable, the prosecutor. In prosecutions for larceny this is eminently proper, since in those prosecutions it is part of the sentence of the court that the defendant should restore the property stolen "if not already restored," recognizing the duty of final if not intermediate restitution. And there is no reason why the same distinction should not be applicable to prosecutions for cheats.<sup>2</sup>

§ 488. It should further be observed, that in states where imprisonment for debt is abolished, it is not proper to permit indirectly, by means of a criminal prosecution, compulsory collection of debts by imprisonment which is forbidden in civil process. Hence, any securities given as a consideration for the withdrawal of a prosecution should be held void when it appears that the prosecution was undertaken for the purpose of enforcing the collection of a debt, unless such securities be allowed by the proper authorities as part of the terms on which the prosecution is to be abandoned.<sup>3</sup>

Criminal prosecutions should not be used for collection of debts.

<sup>1</sup> See Wh. Cr. Pl. and Pr. 8th ed. § 383. 1 Leg. Gaz. Rep. 76; Lindsay v. Smith, 78 N. C. 328; and see fully *supra*,

<sup>2</sup> See Jones v. Rice, 18 Pick. 440. §§ 148 *et seq.*

<sup>3</sup> See, however, Steinbaker v. Wilson,

## CHAPTER XVI.

### CONSIDERATION.

Consideration is what is done in return for a promise, § 493.	Party may waive benefit of statute, § 513.
Promise without consideration not binding, § 494.	Executed act not a valid consideration, § 514.
Exception as to sealed documents, § 495.	Otherwise as to continuing consideration, § 515.
Executed gift cannot be recalled, § 496.	Amount of consideration not material, § 516.
Distinction between "good" and "valuable" considerations, § 497.	Courts will not determine sufficiency, § 517.
Cumulative promise a nullity, § 498.	Gross inadequacy may be ground to set aside, § 518.
But agreement for extension or modification not cumulative, § 499.	Consideration utterly valueless invalid, § 519.
Promise to do what a party is bound to do is not valid, § 500.	Money paid without consideration may be recovered back, § 520.
Question as to promise to reward duty to others, § 501.	Release of unliquidated debt a sufficient consideration for promise to pay a specific sum, § 521.
Agreement to pay public officer invalid, § 502.	One consideration can support several promises, § 522.
So of promises to give extra pay to seamen, § 503.	Promise may sustain promise, § 523.
Part payment no consideration for promise, § 504.	Promise may be contingent, § 524.
Detriment or loss of rights to other side a consideration, § 505.	Promise to support illegitimate children good when on good consideration, § 525.
Party suing must show consideration flowing from himself, § 506.	Assignment of a debt a good consideration, § 526.
Cannot recover unless on duty assumed to himself, § 507.	Releases by other creditors sufficient consideration, § 527.
Promise against policy of law not valid consideration, § 508.	So of mutual subscriptions to charities, etc., § 528.
Illegal consideration vitiates, § 509.	Fraud vitiates such subscriptions, § 529.
And so of impossible consideration, § 510.	So of interchange of patronage, § 530.
When considerations are divisible, illegal or inoperative may be rejected, § 511.	Merely equitable rights a valid consideration, § 531.
Moral obligation not sufficient consideration, § 512.	

Forbearance of legal proceedings sufficient consideration, § 532.	Assuming indebtedness of another a valid consideration, § 536.
So of compromise of doubtful claim, § 533.	So of marriage, § 537.
So of giving up litigated document, § 534.	Equity will not set aside executed gift, § 538.
Forbearance of void claims no consideration, § 535.	In negotiable paper burden is on party disputing consideration, § 539.
	Consideration may be proved or varied by parol, § 540.

§ 493. CONSIDERATION, by our common law, is that which one party to a contract gives or does or promises in exchange for what is given or done or promised by the other party. A consideration, therefore, is an essential incident of a contract; nor is the English common law peculiar in so holding. According to the Roman standards, a contract from the necessity of things is bilateral, one party agreeing to a particular thing in exchange for something to be done by the other party. A mere unilateral engagement is not a contract.<sup>1</sup> But in a contract—*e. g.*, a bilateral engagement—each stipulation is at once a promise and a consideration. A. agrees to work for B. for wages. What A. says is a promise so far as concerns himself and a consideration so far as concerns B.; what B. says is a promise so far as concerns himself and a consideration so far as concerns A.<sup>2</sup> Other systems differ from ours in recognizing as valid unilateral promises, which, in our law, are not binding unless under seal; but all systems of jurisprudence are alike in maintaining that to a contract reciprocal engagements are necessary, whatever may be the names by which these engagements are distinguished. To a contract it is essential that there should be an exchange of legal rights; and what each party does or gives is, according to our terminology, the consideration for what the other party does or gives. A consideration, in this sense, has been said to “consist either in some right, interest, profit, or benefit accruing to the one party, or some forbear-

Consideration is what is done in return for a promise.

<sup>1</sup> It is true that in our own books we have the term “unilateral” sometimes applied to contracts executed on one side—*e. g.*, sales on credit. But even this class of contracts are bilateral in

the Roman sense—*e. g.*, the purchaser promises to pay and the vendor warrants title. Promise is set up against promise.

<sup>2</sup> See *infra*, § 523.

ance, detriment, loss, or responsibility, given, suffered, or undertaken by the other;"<sup>1</sup> but as a mere advantage to the promisor without detriment to the promisee would not avail,<sup>2</sup> the proper test is detriment to the promisee. At the same time we must remember, that "consideration" in our law is not convertible with "causa" or "reason" in the Roman law. All our "considerations" would be "reasons" in the Roman sense; but it does not follow that all "reasons,"—*e. g.*, desire to aid a meritorious object, or to benefit one of my own family,—are considerations in our sense. And though all "considerations" are reasons, yet many of them are so slight that as mere reasons they would be entitled to little weight.<sup>3</sup> An additional endorser, for instance, whom I know to be insolvent, adds very slightly to the security of a debt due me; yet the acquisition of this additional endorser is a sufficient consideration for the extension of the debt.—A consideration, therefore, must be a *quid pro quo*; though its value is to be determined by the parties themselves, and this determination will not be overhauled unless there be fraud. It is a *price*: it may be very inadequate, for the courts do not sit to fix values, but it must be something actually given or done, or promised.—One reason for this condition is *fairness*. A man should not be compelled to give unless on terms of reciprocity; and charity, as such, when ceasing to be voluntary, ceases to exist.—Another reason is implied in the very term *consideration*. Men ought not to be bound by their loose talk. If so, all expressions of gratitude and obligation would have to be suppressed. To make a promise binding it must be made either in a distinctively solemn way, which will be presently considered, or in the shape of a contract in which the parties independently give or take.<sup>4</sup>—Mr. Pollock<sup>5</sup> speaks of the doctrine of consideration, at least in the generality of form and application in which we now have it, "as peculiar to England." It is true, that in France, if Pothier is still authority,

<sup>1</sup> Per cur. *Currie v. Misa*, L. R. 10 Ex. 162.

<sup>2</sup> *Infra*, § 505.

<sup>3</sup> See *infra*, § 516.

<sup>4</sup> See to this effect, observations of Patterson, J., in *Thomas v. Thomas*, 2 Q. B. 859.

<sup>5</sup> Cont. 3d ed. 179.

a gratuitous promise may be the subject of suit. It is otherwise in Germany; and by the most authoritative German commentators, a unilateral declaration of will, though made with the purpose of subjecting the maker to an obligation, creates, when there is no *quid pro quo*, no obligation which can be the subject of a suit, and can at any time be revoked by the maker.<sup>1</sup> But while other systems hold, as does ours, to the position that a mere unilateral promise does not by itself bind, the doctrine of consideration, as we hold it, is peculiar to ourselves. With us, there must be a material *quid pro quo*; there must be something given or surrendered in return, no matter how slight, to make the promise binding. In the modern Roman law, as held in Germany, there must be a *causa* or reason to sustain the promise, and this reason must be rational. In other words, we require a material *quid pro quo*, but the Germans do not; they require that if the reason be irrational the promise is not to bind, while we sustain irrational bargains on considerations often slight when there is no fraud.<sup>2</sup>

<sup>1</sup> Windscheid, Pand. § 304; Koch, § 69.

<sup>2</sup> In the old Roman law, a pollicitation, in its wide sense, included all promises not made under the form prescribed by the law; but in its technical sense it was a promise to the public authorities to do certain things for the public benefit. When a pollicitation was with *justa causa*,—*e. g.*, when the object was to avert some threatened public calamity,—it was held binding. Koch, § 142. A *votum* was a promise to do something for a religious use. L. 2, D. h. t. The modern Roman law rejects both these exceptions, holding, however, that when a *pollicitation* or a *votum* is partially fulfilled, this, as leading the public body or institution partially endowed to take action on the faith of a continuance of the promised aid, binds the promisor.

*Nuda pacta in the Roman law do not*

*mean contracts without consideration, but contracts divested of the prescribed legal form.*—From Koch, II. § 69, the following is condensed: In the old Roman law contracts were classified as (1) real, (2) oral, (3) written, and (4) consensual. A contract not falling under one of these heads did not bind. According to the modern view all contracts bind unless prohibited; according to the view prevalent not only in the jurisprudence of early Rome, but generally in the jurisprudence of all other primitive communities, a contract does not bind unless authorized by the state. Under the old Roman system a specific form of stipulation was prescribed, and no contracts not solemnized in this form bound unless (1) they were executed on one side, or (2) they fell under certain specified heads to be hereafter mentioned. The reason why the validity of contracts was thus restricted, was stated to be the diffi-

§ 494. The distinctive rule of our law, therefore, is that  
 unless with respect to negotiable paper, which is  
 Promise without good though without consideration in the hands of

culty of determining, unless a set form was used, whether one party actually meant to bind himself to another. The use of forms, also, it is argued, adds precision and deliberation to business; people who have to resort to a form to express their views are more likely to act intelligently and accurately than is the case when business is conducted without settled form by word of mouth. This reasoning is to be distinguished from that which rests forms on evidential grounds. It is true that it may be argued that unless contracts are solemnized according to a fixed form much fraud will ensue; and it is on this ground that the English Statute of Frauds, re-enacted with greater or less modifications in all our states, rests. But that this was not the ground taken by the early Roman jurists is shown by the fact that stipulation, prescribed by them as the primary form of binding contract, was not to be in writing, and could be solemnized without witnesses. The prescribed form fell into two classes, oral and literal; *verborum, literarum obligatio*. Of oral contracts, there were two kinds: nexus and stipulation. In addition to these formal contracts, suit could be brought on contracts executed on one side (re contracta obligatio, Real-Contract), and on certain specified business engagements which under the title of consensual contracts (consensu contracta obligatio) were specifically recognized by the Roman law, viz., *emptio venditio, locatio conductio, societas, mandatum*, or, to popularize these terms, sale, hiring, partnership, and agency. In partnership and agency, it is true, this reason does not apply, but these partake of the nature

of real-contracts which are executed on one side, and either may be revoked at will. (See further, *supra*, note to § 1.)

Contracts which do not fall under the preceding heads were called *nuda pacta, nudae pactiones*; on these no suit could be brought, although they might be the basis of an exception. It will be seen, therefore, that the term *nuda pacta* has a very different meaning in the Roman law from what it has in our own law. In the Roman law it means a contract not clothed in the terms the law prescribes; in our own law it is used (leaving specialties and negotiable paper out of account) as meaning a contract without consideration. The strictness of the old Roman law, however, in respect to *nuda pacta* was relaxed; and it was held that suit could be brought on (1) "*pacta in continenti adjecta bei bonae fidei* Kontrakten;" (2) *pacta praetoria*, which were contracts on which suit was allowed by praetorian edict; and (3) *pacta legitima*, on which suits were given by imperial constitutions. These contracts, on which suit could thus be brought, were called *pacta vestita*, as distinguished from *nuda pacta*. In the common law in force in Germany the distinctions above stated (*supra*, § 1) did not take root; on the contrary, by that law, a *nuda pactio* (*i. e.* a claim not clothed with any specific form) may sustain a suit. Forms, so argues Koch, take their origin in popular usage, and without support of such usage cannot exist. In this way the stipulation took its origin in Rome; and in the transfer of the Roman jurisprudence to Germany this particular provision was dropped, since it found no response in German

a *bona fide* endorsee, and to sealed obligations, which will be presently considered, a gratuitous promise, *i. e.* a promise not based on some detriment to the

consideration ordinarily invalid.

popular usage. Hence, when the rule privileging stipulations ceased to exist in Germany, the converse rule, that *nudae pactiones* (contracts destitute of form) could not be sued on, lost its force. On the other hand, under the old English system, which required, as will presently be seen, the oath of witnesses actually present at a transaction to sustain a suit, the maxim that *nudae pactiones* would not sustain a suit was retained, but *nudae pactiones* were interpreted as meaning very different things in England from what they meant in Rome. In Rome, *nudae pactiones* were bargains "naked" because they were not "clothed" with legal form. In England they were bargains "naked" because they were not clothed with proof of a business transaction between the parties.

*Causa distinguishable from consideration.*

In the Roman law the term *causa impulsiva*, or sometimes *causa*, is equivalent to motive, or "*Bewegsgrund*," and gives, according to Koch (Ford. ii. § 101), the reason for which a contract is made. It differs, therefore, from our consideration in this, that a consideration is not always a reason, and a reason is not always a consideration. A moral obligation, for instance, while a reason, is not a consideration, while many considerations (*e. g.* a carrier being permitted to withdraw the thing carried from the owner's care, and a trivial forbearance as to time) are not in any right sense of the term reasons. Hence follows an important difference between the Roman law and our own: by the Roman law the true reason must be given, while by our law it is enough if a sufficient consideration be expressed even though this considera-

tion was not the operative reason. The operative reason, for instance, leading to a conveyance in payment of services already received may be gratitude, but as this consideration could not support the conveyance, the deed alleges a moneyed consideration which, though grossly inadequate, is yet sufficient. In the Roman law, therefore, the *causa* is introduced with a "because;" and the *causa* is logically distinguishable from preamble and inducement, which narrate preliminary conditions but do not undertake to give actual reasons. Hence, when a contract is impeached under the Roman law for defect of *causa*, in other words, when the plea *ex falsa causa* is set up, the defendant must show (1) that the *causa* specified was untrue, and (2) that he would not have made the contract had he not supposed that it was true. Falsity of cause alone will not be sufficient to rescind a contract; it is necessary to show in addition that had the promisor known the falsity of the cause he would not have made the promise. Hence, the defence *ex falsa causa* is equivalent to the defence of error in substance discussed *supra*, §§ 180 *et seq.*

The history of the doctrine of consideration has been lately the subject of much critical examination. According to Mr. Langdell, to constitute a binding contract in the ancient English law—in other words, a contract on which debt, then the sole form of action, could be brought—it was necessary "that the thing given or done, in exchange for the obligation assumed, shall be given or done to or for the obligor directly; that it shall be received by the obligor as the full equivalent for the obligation assumed, and be, in

promisee, is not legally binding.<sup>1</sup> Hence a promise to make a gift will not be enforced even in equity, unless the promisee

legal contemplation, his sole motive for assuming the obligation; and, lastly, that it should be actually executed, *i. e.*, that the thing to be given or done in exchange for the obligation be actually given or done, it not being sufficient for the obligee to become bound to do it. Unless there is a consideration which satisfies each of these requirements, debt will not lie; and this is equivalent to saying there is no binding contract according to the ancient law." Langdell, *Summary*, etc. 59. Valuable as are Mr. Langdell's contributions to this branch of our literature, there should be some qualification, I think, of the above statement. Waiving the question whether the second condition (*viz.*, that the consideration "should be received by the obligor" as a full equivalent) is not defective in imposing, if the term be used subjectively, an impracticable test, I cannot concur in accepting the third condition, *viz.*, that the consideration should have been the "sole motive." I question whether there is any case in which any particular consideration can be spoken of as the "sole" cause, and in the Roman law, in which "*causa*" and "*motive*" are convertible, it was never claimed that the concurrence of other motives made inoperative the motive alleged.—To the consideration necessary to support an action of *assumpsit*, according to Mr. Langdell, it is not necessary that either of the above conditions should contribute. "If anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and, therefore,

if one promise be given in exchange for another promise, there is a sufficient consideration for each." Mr. Langdell goes on to argue that the old action of "debt" was based on a contract which was virtually the real contract of the Roman law. "The consideration, therefore, was of the very essence of a debt—was in fact what created it. But when the action of *assumpsit* was introduced, and a new class of contracts came to be enforced, it was neither necessary nor possible to require the old consideration to make the new contracts binding. It was not necessary because it was neither supposed nor claimed that the new contracts created or constituted debts; and it was not possible, because the very reason why a new action was required to enforce these contracts was that they had not a sufficient consideration to support an action of debt." . . . "The result is that the term '*consideration*' has practically changed its meaning; having formerly meant the consideration necessary to create a debt, it now means the consideration necessary to support *assumpsit*."

Mr. Holmes, in his thoughtful chapter on the history of contracts, "*The Common Law*, by O. W. Holmes, Jr., Boston, 1881," maintains (p. 251) that debt was "simply the general form in which any money claim was collected, except unliquidated claims for damages by force, for which there was established the equally general remedy of trespass." So far from saying that debt was taken from the Roman law, he holds that it "is of pure German

<sup>1</sup> *Wilkinson v. Buyers*, 1 Ad. & El. 108; 2 N. & M. 853; *Holliday v. Atkinson*, 5 B. & C. 501; *Dodge v. Adams*, 19

*Pick*. 429; *Thorne v. Deas*, 4 Johns. 84; *Philadelphia etc. R. R. v. Johnson*, 7 W. & S. 317.



surrenders something in exchange;<sup>1</sup> and this, even though such gift be sustained by the consideration of natural love

descent."—The rule that in simple contract debts a consideration must be proved, he attributes to the fact that such debts were proved by witnesses (the old official witnesses), who "could only swear to facts within their knowledge, coupled with the accident that these witnesses were not used in transactions which might create a debt, except for a particular fact, namely, the delivery of property, together with the further accident that this delivery was *quid pro quo*;" and this, he argues, is "equivalent to the rule that, when a debt was proved by witnesses, there must be *quid pro quo*." "But these debts proved by witnesses," he adds, "instead of by deed, are what we call simple contract debts, and thus, beginning with debt, and subsequently extending itself to other contracts, is established our peculiar and most important doctrine that every simple contract must have a consideration." "The action of debt," he proceeds to say, "has passed through three stages. At first, it was the only remedy to recover money due, except when the liability was simply to pay damages for a wrongful act. . . . The second stage was when the doctrine of consideration was introduced in its earlier form of a benefit to the promisor. . . . The third stage was reached when a larger view was taken of consideration, and it was expressed in terms of detriment to the promisee."—To this,

however, it may be replied that, as is stated in the text, mere benefit to the promisor cannot, from the nature of things, be a consideration, unless it be accompanied by detriment to the promisee (*infra*, § 505). Mr. Holmes, in saying that debt could only be used where the consideration was a benefit actually received by the promisor, no doubt accurately states one of the necessary constituents of the action. But this is not enough. Debt could at no time be maintained, unless the consideration proceeded from the promisee; in other words, unless the promisee suffered some detriment from the contract.

The topic in the text is discussed in an interesting essay by Seuffert, entitled *Zur Geschichte der obligatorischen Verträge*, Nordlingen, 1881. He shows by abundant citations that in the old jurisprudence of Franks and Lombards a *nudum pactum* was a contract not clothed in a form the law prescribed. In secular jurisprudence this was the doctrine of the continent of Europe during the middle ages; but it gradually gave way to the doctrine that a *naturalis obligatio* would sustain an informal promise, which was the rule of the Roman law. According to Seuffert, informal contracts (*formlose Verträge*) could not be sued on in the old German law.—According to Stobbe (*Privat. R.* 3, 64), a more liberal ten-

<sup>1</sup> Bisp. Eq. § 372; Benj. on Sales, 3d Am. ed. § 12; Mahon v. U. S., 16 Wall. 143; Dorsey v. Packwood, 12 How. 126; Hanson v. Millett, 55 Me. 184; Wing v. Merchant, 57 Me. 383; Loring v. Sumner, 23 Pick. 98; Stone v. Hackett, 12 Gray, 227; Kimball v. Leland, 110 Mass. 325; Dodge v. Burdell, 13 Conn. 170; Curry v. Powers, 70 N. Y.

212; Carhart's App., 78 Penn. St. 100; Hitch v. Davis, 3 Md. Ch. 266; Shepherd v. Shepherd, 1 Md. Ch. 244; Buford v. McKee, 1 Dana, 107; Holland v. Hensley, 4 Iowa, 222; People v. Johnson, 14 Ill. 342; Adams v. Hayes, 2 Ired. L. 366; Sims v. Sims, 2 Ala. 117; Barkley v. Hanlan, 55 Miss. 606.

and affection.<sup>1</sup> A warranty, also, given after a sale, is void as without consideration;<sup>2</sup> and so of a promise to leave a proposal open when the promisee does nothing whatever on faith of the promise,<sup>3</sup> though such a promise binds if the other party does or omits to do anything, no matter how slight, in return.<sup>4</sup>—A promise, also, to pay for unsolicited past services is void for want of consideration;<sup>5</sup> and so of promises to pay to religious or charitable objects, when purely gratuitous;<sup>6</sup> and of promises to pay debts that have been released.<sup>7</sup>

§ 495. An exception at common law is recognized in cases of documents under seal. The solemnity of such an obligation is a guarantee, so it is argued, that it is deliberately made, and to deny it validity would be

Exception  
as to prom-  
ise under  
seal.

dency arose in the later middle ages, and suits on informal contracts were sustained.—“It is in the nature of things,” says a reviewer of Seuffert, in the *Kritische Vierteljahrschrift* for 1881, p. 505, “that forms which at one period are natural, necessary, and convenient, in later times should appear arbitrary, superficial, and obstructive. In the Roman law the stipulation would not have been regarded as the normal form of contract had not in early Roman business life the habit arisen to clothe all business dealings in the form of question and answer.” A contract not so framed was (as a rule, subject to some exceptions) a *nudum pactum*. But gradually, so it is shown, when other habits of business and manners grew up, the Roman law approached the rule that good faith was to be the test; that is, want of form, when this was not a note of fraud, did not affect validity. From this came a reaction. It was found that to dispense with all forms led to fraud, and hence came legislation like our own statute of frauds. A similar process, Seuffert tells us, existed in Germany. First no contracts except in the prescribed form were valid. Then all forms were

dispensed with. Then, to prevent frauds and perjuries for certain important transactions, certain forms were prescribed. But in German as well as in Roman law, the *nudum pactum* is not the contract without consideration, but the contract without the prescribed form.

<sup>1</sup> 1 Ch. on Con. 11th Am. ed. 59; *Bret v. J. S. & Wife*, Cro. Eliz. 755; *Duvoll v. Wilson*, 9 Barb. 487; *Pennington v. Gittings*, 2 Gill & J. 208; *infra*, § 540; as to executed gifts, see *infra*, § 496.

<sup>2</sup> *Infra*, § 514; *Roscorla v. Thomas*, 3 Q. B. 234; *Tuttle v. Brown*, 4 Gray, 457; *Vincent v. Leland*, 100 Mass. 432; *Wilmot v. Hurd*, 11 Wend. 584, and other cases cited *Benj. on Sales*, 3 Am. ed. § 610.

<sup>3</sup> *Benj. on Sales*, 3d Am. ed. § 49; *Cook v. Oxley*, 3 T. R. 653, cited *supra*, § 13; *Abbott v. Shepherd*, 48 N. H. 16; *Boston etc. R. R. v. Bartlett*, 3 Cush. 224.

<sup>4</sup> *Supra*, § 13.

<sup>5</sup> *Sanderson v. Brown*, 57 Me. 313; *Bartholomew v. Jackson*, 20 Johns. 28; *infra*, §§ 514, 709.

<sup>6</sup> See *infra*, § 528.

<sup>7</sup> *Hale v. Rice*, 124 Mass. 292, and other cases cited *infra*, § 513.

to deny the right of a party deliberately to dispose of his effects.<sup>1</sup>—In some of our states the distinction between sealed and unsealed obligations is now obliterated,<sup>2</sup> and in others, as will be presently seen, the rules of equity in this respect are adopted as part of the common law.—Illegality of consideration, and impossibility of performance, may be set up as a defence to a speciality as fully as it can be to a suit on an unsealed instrument.<sup>3</sup>—In equity, while a contract under seal without consideration is regarded as so far binding that a suit on it will not be enjoined,<sup>4</sup> its specific performance will not be compelled.<sup>5</sup>—In distributing assets, a creditor holding a voluntary bond is postponed to creditors for value;<sup>6</sup> though he ranks ahead of legatees and all others except creditors for value.<sup>7</sup> In those states where equitable defences can be made at common law this rule applies to suits at common law.<sup>8</sup> But

<sup>1</sup> *Infra*, §§ 680 *et seq.*; *Sharington v. Stratton*, Plowd. 308; *Cooch v. Goodman*, 2 Q. B. 580; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Page v. Trufant*, 2 Mass. 159; *Aller v. Aller*, 40 N. J. L. 446; *Burkholder v. Plank*, 69 Penn. St. 225; *Harris v. Harris*, 23 Grat. 737; *Hannon v. State*, 9 Gill, 440; *Caldwell v. Williams*, 1 Bailey Eq. 175; *McCutchen v. McCutchen*, 9 Port. 650. That a sealed release without consideration discharges a debt, see *infra*, § 682; *Lee v. R. R.*, L. R. 6 Ch. Ap. 527; *Bender v. Sampson*, 11 Mass. 42; *Schuykill Nav. Co. v. Harris*, 5 W. & S. 28.

<sup>2</sup> *Metc.* on Cont. 162; *Ortman v. Dixon*, 13 Cal. 33. As to New Jersey, see *Aller v. Aller*, 40 N. J. L. 446; and see *infra*, § 680.

<sup>3</sup> *Supra*, §§ 300 *et seq.*; §§ 335 *et seq.*

<sup>4</sup> *Supra*, § 493; *Adams Eq.* 78; 1 Fonbl. Eq. B. 1, ch. 5, § 1.

<sup>5</sup> *Leake*, 2d ed. 609; *Bisp. Eq.* § 372; *Jefferys v. Jefferys*, 1 Cr. & P. 138; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Kekewich v. Manning*, 1 D. M. G. 176; *Willard v. Taylor*, 8 Wal. 557; *Seymour v. Delaney*, 6 Johns. Ch. 222;

*Case v. Boughton*, 11 Wend. 106; *Hays v. Kershaw*, 1 Sandf. Ch. 258; *Sherman v. Wright*, 49 N. Y. 231; *Solomon v. Kimmel*, 5 Binn. 232; *Bayler v. Com.*, 40 Penn. St. 37; *Smoot v. Rea*, 19 Md. 398; *Walker v. Walker*, 13 Ired. 335; *Matlock v. Gibson*, 8 Rich. L. 437; *Martin v. Iron Works*, 35 Ga. 320.

<sup>6</sup> *Ellison v. Ellison*, 6 Ves. 656; *Colman v. Sarel*, 3 Bro. C. C. 12; *Hatch v. Bates*, 54 Me. 136. As to frauds on creditors, see *supra*, §§ 376-7.

<sup>7</sup> *Dawson v. Kearton*, 3 Sm. & G. 186, where a promissory note without consideration took priority over legatees; *Candor's App.*, 27 Penn. St. 119.

<sup>8</sup> *Swift v. Hawkins*, 1 Dall. 17; *Carpenter v. Graff*, 5 S. & R. 162; *McCulloch v. McKee*, 16 Penn. St. 289; *Leonard v. Bates*, 1 Blackf. 173. That in equity the consideration of a sealed contract can be overhauled, see *Lowe v. Peers*, 4 Burr, 2225; *Emmens v. Littlefield*, 13 Me. 233; *Ely v. Wolcott*, 4 Allen, 506; *Treadwell v. Buckley*, 4 Day, 395; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Strawbridge v. Cartledge*, 7 W. & S. 394; *Hoeverler v. Mugela*, 66

even in Pennsylvania, where equitable defences are admissible in common law suits, mere want of consideration is no defence, as between the parties, to a suit on a bond, unless fraud or imposition of some sort be alleged. A gift made in this way cannot, as between the parties, be recalled. It is otherwise, however, as to a bond not meant as a gift, the consideration of which fails.<sup>1</sup>

§ 496. When a gratuitous promise has been finally executed by a gift, then the party making the gift (though it is otherwise as to his creditors, supposing the transaction to be fraudulent) cannot recall it. Thus, a parent cannot recover back an article given by him to a child,<sup>2</sup> and a gift binding the donor may be made of a chattel already in donee's hands if acceptance be shown.<sup>3</sup> Gifts *inter vivos*, "when made perfect by delivery of the things given, are executed contracts;"<sup>4</sup> and the donor cannot disturb the donee's possession after the gift is perfected by delivery and acceptance.<sup>5</sup> But delivery and acceptance (in all cases where there is not a valid transfer by deed) are necessary to perfect a gift of chattels,<sup>6</sup> even though the donee may have been in possession at the time as a bailee;<sup>7</sup> though, as has

Penn. St. 348; *Jones v. Jones*, 12 Ind. 389; *Lawton v. Buckingham*, 15 Iowa, 22; *Jeter v. Tucker*, 1 S. C. 246; *Johnson v. Boyles*, 26 Ala. 576; *Bennett v. Solomon*, 6 Cal. 134.

<sup>1</sup> *Good v. Good*, 9 Watts, 567; S. C., 3 W. & S. 472; *Mack's Appeal*, 68 Penn. St. 231; *Burkholder v. Plank*, 69 Penn. St. 225.

<sup>2</sup> *Infra*, §§ 538, 751; *Smith v. Smith*, 7 C. & P. 401; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Faxon v. Durant*, 9 Met. 339; *Rockwood v. Wiggin*, 16 Gray, 402; *Noble v. Smith*, 2 John. 52; *Bond v. Bunting*, 78 Penn. St. 210; *Picot v. Sanderson*, 1 Dev. 309; *University v. McNair*, 2 Ire. Eq. 605; *Matthews v. Smith*, 67 N. C. 374; *West v. Cavins*, 74 Ind. 265. See *supra*, § 377.

<sup>3</sup> *Shower v. Pilck*, 4 Ex. 478; *Wing v. Merchant*, 57 Me. 383; *Champney v. Blanchard*, 39 N. Y. 111; *Huntington*

*v. Gilmore*, 14 Barb. 243; *Ham v. Van Orden*, 84 N. Y. 257.

<sup>4</sup> *Wilde, J., Grover v. Grover*, 24 Pick. 264; *Ham v. Van Orden*, 84 N. Y. 257.

<sup>5</sup> *Jones v. Lock*, L. R. 1 Ch. Ap. 28; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Sheedy v. Roach*, 124 Mass. 472; *Noble v. Smith*, 2 Johns. R. 52; *Picot v. Sanderson*, 1 Dev. N. C. 309.

<sup>6</sup> 1 Ch. on Con. 11th Am. ed. 60; *Ward v. Audland*, 16 M. & W. 862; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Hanson v. Millett*, 55 Me. 184; *Brown v. Brown*, 23 Barb. 565; *Withers v. Weaver*, 10 Barr, 391; *Kidder v. Kidder*, 33 Penn. St. 268; *Trough's Est.*, 75 Penn. St. 115; *Zimmerman v. Streeper*, 75 Penn. St. 147; *Adams v. Hayes*, 2 Ired. L. 366; *Sims v. Sims*, 2 Ala. 117.

<sup>7</sup> *Shower v. Pilck*, 4 Exch. 478; *Dole v. Lincoln*, 31 Me. 422.

been just seen, if acceptance be shown, and there be an intention to transfer the property, the gift may bind.<sup>1</sup>

§ 497. According to Blackstone, "a good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent for the grant; and is, therefore, founded in motives of justice."<sup>2</sup> But this distinction is merely speculative. A promise based on a merely good "consideration will not be enforced against creditors, nor, in equity, against the party himself, unless there be a sealed obligation amounting to a gift."<sup>3</sup> A "good" consideration, therefore, is virtually no consideration, so far as concerns creditors, though it may be sustained, when executed, as a family arrangement between the parties, or by solemnization through a sealed obligation.<sup>4</sup> A deed in consideration of marriage, as we will hereafter see, is made on a valuable consideration, and is therefore good against creditors.<sup>5</sup>

§ 498. When a legal obligation already exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. Such promise adds nothing to and takes nothing from the original obligation, and being without consideration to support it, will not sustain a suit.<sup>6</sup> Thus, although my promise to pay the debt secured by a lost note signed by me will bind me, if it be in consideration of my being indemnified from suit on such note;<sup>7</sup> yet a mere promise to pay such debt, without any new consideration, cannot be regarded as imposing on me a binding duty.<sup>8</sup> Even a promise to pay a specific sum on account of a

Distinction between "good" and "valuable" consideration nugatory.

Cumulative promise a nullity.

<sup>1</sup> That equity will not set aside an executed gift, see *infra*, § 538; and see *supra*, § 164; *infra*, § 751.

<sup>2</sup> 2 Bl. Com. 297.

<sup>3</sup> *Infra*, § 540; *supra*, § 494.

<sup>4</sup> Leake, 2d ed. 614; Pulvertoft v. Pulvertoft, 18 Ves. 100; Violet v. Patton, 5 Cranch, 142.

<sup>5</sup> *Infra*, § 537.

<sup>6</sup> *McManus v. Bark*, L. R. 5 Ex. 65; *Deacon v. Gridley*, 15 C. B. 295; *Mallalieu v. Hodgson*, 16 Q. B. 689; *Robb v. Mann*, 11 Penn. St. 300; *Gilmore v. Green*, 14 Bush, 772.

<sup>7</sup> *Williamson v. Clements*, 1 Taunt. 523; see *Conover v. Stillwell*, 34 N. J. L. 54.

<sup>8</sup> *Davis v. Dodd*, 4 Taunt. 602.

liability for unliquidated damages is invalid, unless the promise be conditioned upon some new consideration, such as delay or forbearance or release.<sup>1</sup> A cumulative promise of marriage, also, one promise being already in force, is a nullity.<sup>2</sup>

§ 499. An agreement between debtor and creditor, however, by which, before breach, the time for performance is extended, though on the same conditions or on the same rate of interest, cannot be called cumulative.

This is eminently the case with loans, the extension of which gives the creditor the benefit of a renewed fixed investment, not liable to be paid off at the debtor's will, which constitutes the detriment to the debtor.<sup>3</sup> The same rule is applicable to other cases of extension.<sup>4</sup> But a mere agreement to give time, without any advantage coming to the creditor from the delay, does not bind the creditor. The debtor's promise to pay is only cumulative, and no consideration for the promise to delay.<sup>5</sup> There must be some advantage moving to the creditor in order to make his extension binding.<sup>6</sup> What has been said applies to all cases of modification and reconstruction. In such cases the abandonment of the old agreement is a good consideration for the new agreement.<sup>7</sup> But there must be something surrendered by the promisee to make the promise binding. The thing surrendered may be very slight; but if appreciable, it is an adequate consideration. And the reconstruction of an old contract, based on a past compromise, contains mutual concessions, which, as constituting a novation, form in themselves a binding contract.<sup>8</sup>

<sup>1</sup> Smart v. Chell, 7 Dowl. 781; see Bryan v. Brazil, 52 Iowa, 350.

<sup>2</sup> Raymond v. Sallick, 10 Conn. 480.

<sup>3</sup> *Infra*, §§ 870, 1000; Chute v. Pattee, 37 Me. 103; McNish v. Reynolds, 10 Weekly Notes, 24, cited *infra*, § 870; Jones v. Horner, 60 Penn. St. 214; Fawcett v. Freshwater, 31 Oh. St. 637; and cases cited Wald's Pollock, 162.

<sup>4</sup> Goss v. Nugent, 5 B. & Ad. 58; Carrier v. Dilworth, 59 Penn. St. 406.

<sup>5</sup> Bates v. Starr, 2 Vt. 536; Russell v.

Buck, 11 Vt. 166; Kellogg v. Olmsted, 25 N. Y. 189; Parmelee v. Thompson, 45 N. Y. 58; Grossman v. Wohlleben, 90 Ill. 537; and cases cited Wald's Pollock, *ut supra*; Deacon v. Gridley, 15 C. B. 295.

<sup>6</sup> Wright v. Bartlett, 43 N. H. 548; Beckner v. Carey, 44 Ind. 89; Clarkson v. Creely, 35 Mo. 95; Martin v. Black, 20 Ala. 309.

<sup>7</sup> *Infra*, §§ 852 *et seq.*

<sup>8</sup> *Infra*, §§ 856 *et seq.*

§ 500. A promise by A. to do what he is already bound to do to B. is not a sufficient consideration to support a promise by B. to do something in return to A.; in other words, a promise cannot be conditioned on a promise to do a thing to which a party is already legally bound.<sup>1</sup> Hence, a promise to pay a witness extra fees for attendance on court is invalid;<sup>2</sup> though this would not hold in reference to promises to pay experts for special professional assistance;<sup>3</sup> and so, generally, as we have seen of a promise to pay a debt already existing.<sup>4</sup> Whether a promise to finish a work already undertaken is a good consideration depends upon whether the party making the promise has encountered any fresh difficulties which might give him an excuse for surrendering the work, or whether any additional burden has been cast on him. In either of these cases, the promise to finish the work is a good consideration to support a promise to give some additional advantage to the employee;<sup>5</sup> though otherwise not.<sup>6</sup> In other words, if there is a novation, the new promise binds; but it does not unless, in consequence of some change of relations, there is a novation.<sup>7</sup>—It should be added, that when a legal duty is questionable, then, as a matter of compromise, an agreement to perform it, and to waive any defence that may heretofore have been made to its performance, will be held a good consideration.<sup>8</sup> And when the debtor is able to delay fulfilling his contract, the consideration of his waiving such opportunities of procrastination and proceeding to prompt performance

Promise to do what a party is legally bound to not a sufficient consideration.

<sup>1</sup> *Infra*, § 720; 1 Ch. on Con. 11th Am. ed. 60; Leake, 2d ed. 621; citing Jackson v. Cobbin, 8 M. & W. 790; Bayley v. Homan, 3 Bing. N. C. 915; Dixon v. Adams, Cro. Eliz. 538; Callaghan v. Hallett, 1 Caines, 104; L'Amoureux v. Gould, 3 Seld. 349; Cleveland v. Lenze, 27 Oh. St. 383; Runnamaker v. Cordray, 54 Ill. 303. That agreements to influence public officers are void, see *supra*, § 405. That when there is a fixed salary, extra pay cannot be recovered, see *infra*, § 720.

<sup>2</sup> Dodge v. Stiles, 26 Conn. 463;

Patterson v. Donner, 48 Cal. 369; Dawkins v. Gill, 10 Ala. 206; Sweany v. Hunter, 1 Murph. 181.

<sup>3</sup> Wh. on Ev. § 456.

<sup>4</sup> *Supra*, § 498; *infra*, § 514.

<sup>5</sup> Munroe v. Perkins, 9 Pick. 305; Cooke v. Murphy, 70 Ill. 96.

<sup>6</sup> Cole v. Shurtleff, 41 Vt. 311; Reynolds v. Nugent, 25 Ind. 328; Ayers v. R. R., 52 Iowa, 478; Anson, 76.

<sup>7</sup> See *infra*, §§ 852 *et seq.*

<sup>8</sup> *Infra*, §§ 533, 852.

may sustain a promise to give him additional compensation.<sup>1</sup> Here, again, there is a reconstruction of the contract amounting to a novation which, as such, binds the parties.<sup>2</sup>

§ 501. A distinction has been taken by a learned English judge in this relation between a promise to reward A. for doing his duty to a third party, and a promise to reward A. for doing his duty to the promisor.—“If a man,” said Wilde, B.,<sup>3</sup> “has already contracted with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual; but it is possible to make a valid promise to another to do the same thing.” And in a much-discussed English case, where an uncle wrote to a nephew, who was about to be married, “I am glad to hear of your intended marriage to E. N., and as I promised to help you at starting, I am happy to tell you I will pay you one hundred and fifty pounds yearly, during my life;”—this was held a binding promise.<sup>4</sup> But apart from the fact that the letter in this case seems to indicate a continuous promise conditioning the nephew’s engagement, the ruling was weakened by the dissent of Byle, J., as against Erle, C. J., and Keating, J. It is supported, indeed, by Mr. Pollock,<sup>5</sup> but as is pointed out by Mr. Wald, the learned American editor of Mr. Pollock’s work,<sup>6</sup> by reasoning which assumes that the party thus promising to pay another to do his duty to a third party has a right in the very matter concerning which his right is questioned.<sup>7</sup> To this it may be added, that giving to a third party the right to interfere with other parties’ contracts (*e. g.*, by enabling A., when there is a relation of debtor and creditor established between B. and C., to become B.’s creditor as to the very matter in which B. is debtor to C.), is to create a

<sup>1</sup> *Munroe v. Perkins*, 9 Pick. 298;

*Lattimore v. Harsen*, 14 John. 330;

*Stewart v. Keteltas*, 36 N. Y. 388;

*Cooke v. Murphy*, 70 Ill. 96; cited,

Wald’s *Pollock*, 164.

<sup>2</sup> *Infra*, § 858 *et seq.*

<sup>3</sup> *Scotson v. Pegg*, 6 H. & N. 295.

<sup>4</sup> *Shadwell v. Shadwell*, 9 C. B. N.

S. 159.

<sup>5</sup> *Cont.* 3d ed. 195.

<sup>6</sup> *Wald’s ed.* 185.

<sup>7</sup> To this effect are cited *Gordan v.*

*Gordon*, 56 N. H. 170; *Davenport v.*

*First Cong. Soc.*, 33 Wis. 387; *John-*

*son v. Seller*, 33 Ala. 265.



double duty, against the policy of the law. There cannot be equal loyalty to two duties which would be likely to conflict.<sup>1</sup>

§ 502. We have already seen that an agreement by a private person to pay a public officer for doing his duty is invalid as contrary to the policy of the law.<sup>2</sup> Such an agreement, also, is invalid as without consideration.<sup>3</sup> It is otherwise, however, as to matters not in the scope of the officer's public duties. Unless it be one of the conditions of his office that his whole time should be given up to the state, he is entitled to sell to third parties such of his services as the state does not require.<sup>4</sup> Hence a constable, or other peace officer, may be remunerated for special attentions not in the line of his employment.<sup>5</sup> But agreement to pay for such services must be special in order to bind.<sup>6</sup> On the same reasoning, special services rendered by

Agreement to pay public officers invalid.

<sup>1</sup> See *infra*, §§ 506, 810.

<sup>2</sup> *Supra*, § 403.

<sup>3</sup> Leake, 2d ed. 620, citing *Bridge v. Cage*, Cro. Jac. 103. To same effect, see *Callaghan v. Hallett*, 1 Caines, 104; *Evans v. Trenton*, 4 Zab. 764; *Smith v. Whildin*, 10 Barr, 39; *Gilmore v. Lewis*, 12 Ohio, 281; *Burk v. Webb*, 32 Mich. 173; *Mitchell v. Vance*, 5 Monroe, 529; *Odineal v. Barry*, 24 Miss. 9.

<sup>4</sup> *England v. Davidson*, 11 A. & E. 856.

<sup>5</sup> *Davis v. Munson*, 43 Vt. 676.

<sup>6</sup> In a case before the supreme court of Ohio in 1882 (*Cincinnati R. R. v. Lee*, 13 Rep. 280), the plaintiff was prosecuting attorney of Erie county, Ohio, at the time the services were rendered, which consisted in appearing before a magistrate, at the request of the company, and prosecuting certain felonies. The plaintiff had judgment, and defendant assigned error. This was reversed in the supreme court, Okey, J., saying: "Lee having performed services as an attorney, in pursuance of the request of the railroad company, the agreement of the com-

pany to compensate him would be applied, in the absence of any other fact. But the law does not imply such promise in all cases where one performs service at the request of another. Take the familiar example of a son who continues, after arriving at age, to live with his father, and performs service at his request. The son may have expected to be paid wages, but, from the mere fact that he acted under direction of his father in the same way as during his minority, a contract to pay wages will not be implied. To constitute an agreement to pay wages in such a case it is not essential that any price should be fixed, but words must be employed showing that both parties understand that wages are to be paid. It is the duty of the prosecuting attorney to conduct the prosecution of offenders in the court of common pleas; but in *Smith v. Portage County*, 9 Ohio, 25, it is said that he is not bound to appear before a justice of the peace or mayor in a criminal case. The law remains the same to the present day. But in fact that officer, in many cases, appears voluntarily in

an officer of a corporation, though in the line of his duty, form no consideration for a subsequent promise by the corporation to pay for them.<sup>1</sup>

§ 503. When a seaman is bound by his contract of service to serve for a particular voyage, a promise to increase his wages, unless there is increased duty or hazard, does not bind the promisor.<sup>2</sup> It is otherwise, however, if the promise is made in consideration of increased peril and labor under circumstances which would have justified the seaman in throwing up the contract.<sup>3</sup>

Promises to seamen of increased pay not ordinarily binding.

§ 504. On the same reasoning, part payment of a liquidated debt is no consideration for a promise from the creditor to the debtor in all cases where the debt is at the time due and payable.<sup>4</sup> Hence, as between debtor and creditor alone (the element of reciprocal release by other creditors, the one in consideration of the other, not coming in), the payment of one

Part payment of a debt no consideration for a promise by creditor to debtor.

the examining court, and conducts the prosecution there. He does the same thing sometimes at the request of a citizen, without any expectation on his part to receive, or on the part of the citizen to pay, compensation for the services. We cannot say, looking to the facts stated in this answer, that there was an implied contract on the part of the company to pay Lee compensation for his services. The further proposition is urged by the counsel for the company that even an express agreement to pay would have been void as contrary to public policy. But upon that question we express no opinion."

<sup>1</sup> *Loan Ass. v. Stonemetz*, 29 Penn. St. 534. See as to extra pay, *infra*, § 720. That agreement to pay public officer private remuneration is invalid, see *supra*, § 413.

<sup>2</sup> *Supra*, § 499; and see, also, Leake, 2d ed. 621; *Stilk v. Myrick*, 2 Camp. 317; *Frazer v. Hatton*, 2 C. B. N. S.

512; *Harris v. Carter*, 3 E. & B. 559; *Bartlett v. Wyman*, 14 Johns. 260; *The Brookline*, 8 Bost. L. Rep. 70.

<sup>3</sup> *Hartley v. Ponsonby*, 7 E. & B. 872; see *Clutterbuck v. Coffin*, 4 Scott N. R. 509; *Newman v. Walters*, 3 B. & P. 612; see 2 Ch. on Con. 11th Am. ed. 61.

<sup>4</sup> Met. on Con. 191; Leake, 2d ed. 619; *Cumber v. Wane*, 1 Str. 426; S. C. in 1 Smith's Lead. Cas. 7th Am. ed. 595; *Jones v. Waite*, 5 Bing. N. C. 341; *Orme v. Golloway*, 9 Ex. 544; *Baillie v. Moore*, 8 Q. B. 489; *Bailey v. Day*, 26 Me. 88; *White v. Jordan*, 27 Me. 370; *Smith v. Bartholomew*, 1 Met. 278; *Warren v. Hodge*, 121 Mass. 106; *Warren v. Skinner*, 20 Conn. 559; *Pabodie v. King*, 12 Johns. 426; *Watts v. French*, 19 N. J. Eq. 407; *Daniels v. Hatch*, 1 Zab. 391; *McKenzie v. Culbreth*, 66 N. C. 534; *Pearson v. Thomason*, 15 Ala. 700; *Carraway v. Odeneal*, 56 Miss. 223; and see cases cited *infra*, §§ 935, 996, 1000 *et seq.*

part of a debt is no consideration for a promise not to sue on the other part.<sup>1</sup> And hence, also, payment of the principal of a note is not in itself a sufficient consideration for a promise to pay the interest.<sup>2</sup> At the same time, as has been noticed and will hereafter be seen more fully, the surrender by one party of any vantage ground is a sufficient consideration for a counter promise from the other party;<sup>3</sup> and this is the case, also, with the giving of any security which the creditor did not before possess. Hence an accepted draft for a part of the debt will be a consideration for the release of the rest;<sup>4</sup> and so will the note of a third person;<sup>5</sup> and so of a guaranty of a third person;<sup>6</sup> and so of a specific article or *bonus* received in satisfaction.<sup>7</sup> It has also been held that payment before maturity may be a good consideration for a reduction of the debt.<sup>8</sup> And a payment of a smaller sum in cash may be a sufficient consideration to support a promise to satisfy an unliquidated claim for a larger amount.<sup>9</sup>—In what cases a payment amounts to accord and satisfaction is hereafter independently discussed.<sup>10</sup>

<sup>1</sup> *Infra*, §§ 935, 996 *et seq.*; *Fitch v. Sullen*, 5 East, 230; *Down v. Hatcher*, 10 A. & E. 121; *Smith v. Page*, 15 M. & W. 683; *Goodwin v. Follett*, 25 Vt. 386; *Harriman v. Harriman*, 12 Gray, 341; *Bunge v. Koop*, 48 N. Y. 225; *Line v. Nelson*, 9 Vroom, 358; *Rising v. Patterson*, 5 Whart. 319; see *Jenness v. Lane*, 26 Me. 475.

<sup>2</sup> *Willis v. Gammill*, 67 Mo. 730.

<sup>3</sup> *Infra*, §§ 534 *et seq.*, 852 *et seq.*; *Brooks v. White*, 2 Met. Mass. 283; *Kellogg v. Richards*, 14 Wend. 116; *Harper v. Graham*, 20 Ohio, 105.

<sup>4</sup> *Infra*, §§ 953 *et seq.*, 1003; *Sibree v. Tripp*, 15 M. & W. 23; *Frisbie v. Larned*, 21 Wend. 450; *Douglass v. White*, 3 Barb. Ch. 621; *Milliken v. Brown*, 1 Rawle, 391; *Reid v. Hibbard*, 6 Wis. 175.

<sup>5</sup> *Hinckley v. Avey*, 27 Me. 362; *Brooks v. White*, 2 Met. Mass. 283; *Kellogg v. Richards*, 14 Wend. 116; *Sanders v. Bank*, 13 Ala. 353; *infra*, § 954.

<sup>6</sup> *Lewis v. Jones*, 4 B. & C. 506; *Little v. Hobbs*, 34 Me. 357; *Kellogg v. Richards*, 14 Wend. 116; *Bliss v. Swartz*, 7 Lans. 186; *Maddux v. Bevan*, 39 Md. 485.

<sup>7</sup> *Infra*, § 1006; Co. Lit. 212 b; *Pinnel's case*, 5 Coke, 117; Met. on Con. 191; *Blinn v. Chester*, 5 Day, 359; *Boyd v. Hitchcock*, 20 Johns. 76; *Kellogg v. Richards*, 14 Wend. 116; *McKenzie v. Culbreth*, 66 N. C. 534; *Sanders v. Bank*, 13 Ala. 353; and cases cited *infra*, § 1000 *et seq.* Whether a seal makes a difference has been already considered. *Supra*, § 495.

<sup>8</sup> *Infra*, §§ 1001-3; *Pinnel's case*, 5 Coke, 117; *Brooks v. White*, 2 Met. 283; *Bowker v. Childs*, 3 Allen, 434; *Arnold v. Park*, 8 Bush, 3; *Rose v. Hall*, 26 Conn. 392; *Smith v. Brown*, 3 Hawkes, 580; and see cases cited *infra*, § 1002.

<sup>9</sup> *Infra*, §§ 521 a, 935, 1000.

<sup>10</sup> *Infra*, §§ 996 *et seq.*

§ 505. It is frequently stated that detriment to the promisee is as good a consideration as is benefit to the promisor, and that either benefit to the promisor or detriment to the promisee will be a sufficient consideration.<sup>1</sup>—But this is not strictly accurate. While a detriment to the promisee is a sufficient consideration without benefit to the promisor, benefit to the promisor is not a sufficient consideration without detriment to the promisee. If I receive a benefit, for instance, this does not subject me to suit from a party who has done nothing to procure me the benefit, no matter how solemnly he may have bound himself to aid me in obtaining this benefit. Detriment to the promisee of some kind there must be to sustain the promise; though this detriment may consist of rights surrendered as well as of work done or money or goods parted with. The promise, in fact, is conditioned on this detriment, and unless the detriment is suffered, the promise is not operative. This condition may be contingent, when not until the contingency occurs (*e. g.*, the work done, or the goods transferred, or the service performed) does the promise bind.<sup>2</sup>—The condition may be a contingent surrender of a right by the promisee.<sup>3</sup> Hence it has been held that a promise by the heir-at-law of a dying relative, to pay a designated person a certain sum out of the estate, supposing there is no will, binds the party making the promise;<sup>4</sup> and a resignation, also, by a pastor of his office is a consideration for a promise to give him certain aid on his resignation.<sup>5</sup> Hence, also, a note given to a literary institution in consideration of its assuming additional liabilities is a sufficient consideration.<sup>6</sup> The loss or inconvenience

<sup>1</sup> *Nerot v. Wallace*, 3 T. R. 24; *Bailey v. Croft*, 4 Taunt. 611; *Bunn v. Gay*, 4 East, 190; *Thomas v. Thomas*, 2 Q. B. 851; *Towsley v. Sumrall*, 2 Pet. 182; *Chick v. Trevett*, 20 Me. 462; *Foster v. Phaley*, 35 Vt. 303; *Forster v. Fuller*, 6 Mass. 58; *Powell v. Brown*, 3 Johns. 100; *Miller v. Drake*, 1 Caines, 45; *Seaman v. Seaman*, 12 Wend. 381; *White v. Baxter*, 71 N. Y. 254; *Lewis v. Seabury*, 74 N. Y. 409; *Conover v. Stillwell*, 34 N. J. L. 54; *Bradshaw v.*

*McLaughlin*, 39 Mich. 480; *Watkins v. Turner*, 34 Ark. 663; *infra*, § 1002.

<sup>2</sup> *Supra*, § 24; *infra*, §§ 545 *et seq.*; *Hilton v. Southwick*, 17 Me. 305; *Etheridge v. Thompson*, 7 Ired. 127.

<sup>3</sup> *Infra*, § 579; *Richardson v. Gosser*, 26 Penn. St. 355.

<sup>4</sup> *Parker v. Urie*, 21 Penn. St. 305.

<sup>5</sup> *Worrell v. Presb. Ch.*, 8 C. E. Green, 96.

<sup>6</sup> *Simpson College v. Bryan*, 50 Iowa, 293; *infra*, § 528.

to the promisee, however, must be incurred at the request of the promisor; a promise by way of indemnity for a past loss is without consideration.<sup>1</sup>—As illustrations of the principle before us may be noticed guarantees. In contracts of this class it is enough to establish the binding character of the contract of guarantee if the person to whom the guarantee is given suffers inconvenience, as an inducement to the surety to become guarantee for the principal debtor.<sup>2</sup>—The abandonment of any right by the promisee, no matter how slight or how disputable, is a sufficient consideration for a promise by the promisor.<sup>3</sup>—When a *bona fide* abandonment of a right is shown, the courts will not undertake to determine the value of the right abandoned. It will form, no matter how slight, a consideration for a promise unless the transaction was so preposterous as to indicate fraud.<sup>4</sup> The sale of ancient lights and of rights of way, at high prices, though of little value to the owner, illustrates the position above given that a surrender of a right, or a detriment, as it is called, is a good consideration. In conformity with this view it was held in Michigan, in 1880, that when D. a debtor, and M. a party holding a mortgage on D.'s property, agreed with S., a subsequent mortgagee, that the property should be put up at auction to satisfy the latter's claims, there was a sufficient consideration to support the agreement in the waiver of mortgage security it involved.<sup>5</sup>—An unconscionable agreement, however, by which a preposterous sum is required for the surrender of a right, will not be sustained.<sup>6</sup>—Under the same head may fall

<sup>1</sup> *Infra*, § 514.

<sup>2</sup> *Per cur.*, *Morley v. Boothby*, 3 Bing. 113, cited *Leake*, 2d ed. 611; *Brooks v. Ball*, 18 Johns. 357.

<sup>3</sup> *Mather v. Maidstone*, 18 C. B. 273; *Forster v. Fuller*, 6 Mass. 58; *Stebbins v. Smith*, 4 Pick. 97; *Smith v. Weed*, 20 Wend. 184; *Haines v. Haines*, 6 Md. 435; *Williams v. Alexander*, 4 Ired. Eq. 207; *Pitt v. Gentle*, 49 Mo. 74. As to forbearance to sue, see *infra*, § 532; as to compromises, see *infra*, § 533; as to equitable rights, see *infra*, § 531.

<sup>4</sup> See *infra*, §§ 517, 1001; *Brown v.*

*Brine*, L. R. 1 Ex. D. 5; *Edgeware Highway v. Gas Co.*, L. R. 10 Q. B. 92; *Laurence v. McCalmont*, 2 How. 426; *Warren v. Whitney*, 24 Me. 561; *Whittle v. Skinner*, 23 Vt. 532; *Clark v. Sigourney*, 17 Conn. 511; *Coleman v. Eyre*, 45 N. Y. 38; *Neal v. Gilmore*, 79 Penn. St. 421; *Buchanan v. Bank*, 78 Ill. 500; *Tompkins v. Philips*, 12 Ga. 52.

<sup>5</sup> *Bradshaw v. McLaughlin*, 39 Mich. 480.

<sup>6</sup> *Supra*, § 169; *infra*, § 518.

the reconstruction of an agreement by which new terms are imposed. The promisee's abandonment of the old terms are the consideration for the adoption of the new.<sup>1</sup> It is otherwise when the old agreement has been absolutely done away with, and when after an entire vacating of the old agreement a new agreement is established on a new consideration. To make such new agreement binding the new consideration must be proved. Hence, renewing a broken contract of marriage requires as strong proof as did the original contract.<sup>2</sup>—Of surrender of rights, the most extreme illustration that can be taken is that given in an early English case in which it was held that parting with the possession of goods and placing them in the hands of another is a sufficient consideration for a promise by the latter to deliver them safely.<sup>3</sup> To sustain such a consideration, however, it must be something appreciable on which the minds of the party are fixed. It must be, "if you will carry the goods I will surrender possession of them to you." This would be a surrender of a right.<sup>4</sup> The surrender, also, of a right incident to the depositing of a sum of money by the plaintiff in the defendant's hands is a sufficient consideration for a promise to keep it safely and return it.<sup>5</sup>

§ 506. In all cases where a consideration is required, a party suing on a contract, as we will hereafter see more fully,<sup>6</sup> must show that the consideration flowed from him. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the defendant, but it must be some detriment to the plaintiff, and it must move from the plaintiff,<sup>7</sup> and this is tantamount to saying

Party suing must show consideration flowing from himself.

<sup>1</sup> *Brown v. Everhard*, 52 Wis. 205; *infra*, § 858; *Cutter v. Cochran*, 116 Mass. 408; *Rollins v. March*, 128 Mass. 116.

<sup>2</sup> *Dean v. Skiff*, 128 Mass. 174.

<sup>3</sup> *Wheatley v. Low*, Cro. Jac. 668; see *Riches v. Briggs*, Yel. 4. In *Coggs v. Bernard*, 2 Ld. Ray. 909, 920, Lord Raymond is reported to have said that delivery of casks to a party to be carried is a sufficient consideration for the contract of carriage.

<sup>4</sup> See observations in *Holmes' Common Law*, 291.

<sup>5</sup> *Whitehead v. Greetham*, McC. & Y. 205; *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; *Hart v. Miles*, 4 C. B. N. S. 371.

<sup>6</sup> *Infra*, §§ 784 *et seq.*, and see *supra*, § 184.

<sup>7</sup> See *Patterson, J., Thomas v. Thomas*, 2 Q. B. 859; adopted in *Leake*, 2d ed. 612.

that there must be in all cases some detriment to the promisee. The promisee, in other words, must have done something or suffered something at the promisor's request as a reason for the promise.—The promise, so far as he is concerned, must not have been gratuitous.<sup>1</sup>—Hence a promise to me by B. to pay C.'s debt to me does not bind B. to me, unless in exchange for this promise I give C. indulgence, or in some way benefit B.; nor can I support the suit by showing that some one else agreed to give C. indulgence or to confer some benefit on B.<sup>2</sup> A promise by me, also, to pay a reward for the discovery of a lost article can only be enforced against me by a person who has done something, no matter how slight, in bringing the lost article to light, and who was aware of the reward.<sup>3</sup> The real party in interest is to bring suit; if a principal acts through an agent, it is the principal who is to sue, and against whom set-offs may be introduced.<sup>4</sup> In some of the earlier cases liability was further extended.<sup>5</sup> “If A. promised to pay B. £1000 if C. would go to Rome, and C. took the journey, he and not B. was regarded as entitled to the reward, and to compel the payment of it by suit. For as the action of *assumpsit* was, as stated, brought not to enforce the contract specifically, but to recover compensation for the injury occasioned by the breach of faith, the person who parted with his property, or rendered the stipulated service, was obviously the one who should be compensated in damages.”—In a Pennsylvania case, adopting substantially the same rule, the evidence was that the defendant, a member of a congregation of which M. was the minister, promised the plaintiff to pay him twenty-five dollars for the services to be rendered by M. as minister for a particular year. The money was for M.'s use, and it was held

<sup>1</sup> *Infra*, § 784, *supra*, § 505; *Bourne v. Mason*, 1 Vent. 6; *Crow v. Rogers*, 1 Str. 592; *Company of Felt Makers v. Davis*, 1 B. & P. 102; *Mandeville v. Welch*, 5 Wheat. 277; *Fugrove v. Mutual Soc.*, 46 Vt. 362; *Segars v. Segars*, 71 Me. 530; *Stoddard v. Ham*, 129 Mass. 383; *Bury v. Ziegler*, 93 Penn. St. 367; *Gibson v. Cooke*, 20 Pick. 18; *Stewart v. Hamilton College*, 2 Denio, 403; see *infra*, §§ 723 *et seq.* 784 *et seq.*

<sup>2</sup> See *Price v. Easton*, 4 B. & Ad. 433; S. C., 1 N. & M. 303; overruling *Martyn v. Hind*, 2 Cowp. 443; 1 Dougl. 146.

<sup>3</sup> See *supra*, § 24.

<sup>4</sup> *Supra*, § 96; *infra*, § 802.

<sup>5</sup> See Judge Hare's *Lectures on Contracts*, 20.

that M. should have sued for it. "A parol promise to one for the benefit of another," so it was held by Gibson, C. J., "can support an action on it only by him from whom the consideration moved, or who was the meritorious cause of it. And the rule is founded in good sense, not only because it avoids circuitry, but because there is no necessity that one who has been the mere recipient of a promise should sue on it as a trustee, when there is no trust, and when the party beneficially entitled is able to sue for himself. *Neither in equity nor in law is a bare recipient a party to the contract.*"<sup>1</sup> The words italicized show that what Chief Justice Gibson had in view were contracts of agency in which the principal can unquestionably sue on a parol contract made by his agent.<sup>2</sup> But the prevalent English view<sup>3</sup> is that where a promise is made to A. for B.'s benefit, the suit to enforce the promise must be brought by A.<sup>4</sup> It is true that the party from whom the consideration flows must sue either in his own name when a party, or in the name of his trustee when not a party. But, nevertheless, according to the English doctrine, as will be seen in the next section, none but a party to the contract can sustain on it a suit. There is no hardship in this. The party beneficially interested may use his trustee's name, or compel the trustee to sue. On the other hand, a mere stranger, who is not a trustee, and who has not done anything or surrendered anything in consideration of the defendant's promise, cannot sue on the promise.

<sup>1</sup> *Edmunson v. Penny*, 1 Barr, 334.

<sup>2</sup> Wh. on Agency, §§ 4, 5, 147, 395, 722. In an early case, where a conversation took place between two fathers, in which one promised that if the other would give his daughter in marriage to his son he would settle certain lands on the married couple, and the marriage took place in part reliance on this statement, but the settlement was not made, it was held that the husband might maintain an action for the default. But of this Mr. Leake, 2d ed. 483, says: "no modern case can be found to support such an exception to the general rule; and, on the contrary, it has always

been held that no stranger can take advantage of a contract made with another person." *Tweddle v. Atkinson*, 1 B. & S. 393; and see as to children under marriage settlement suing, *infra*, § 790. In *Dashwood v. Jermyn*, L. R. 12 Ch. D. 776, P. a stranger to the family promised certain benefits to M. to enable M. to marry one of F.'s daughters, on faith of which M. was married to F.'s daughter. It was held that this was a promise on P.'s part without consideration.

<sup>3</sup> See Leake, 2d ed. 443.

<sup>4</sup> See also *infra*, § 799.



§ 507. We have just seen that the party from whom the consideration proceeds must be the party to sue for the equivalent of such consideration, though when the contract is made by an agent, he may sue either in his own or in his principal's name. We have next to observe that a party cannot recover unless on a duty assumed to himself. "When two persons for valuable consideration between themselves covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other."<sup>1</sup> "No one can be made a debtor for money paid, unless it was paid at his request."<sup>2</sup> "A debtor cannot discharge his liability to his creditor by seeking some person whom his creditor happens to owe and paying his debt to him."<sup>3</sup> That to entitle a person to sue on a contract, not only must he be, as was just seen, beneficially interested in the contract, but he must be a party to the contract, is, as we will hereafter see more fully, a settled principle of the English common law.<sup>4</sup> Much conflict of opinion, however, exists in this country on the question whether a party for whose benefit a contract is made, but who is not a party to it, can sue on such contract.—If a credit is obtained by my agent or trustee, there is no question of my right to sue on it, although I knew nothing of the transaction at the time, and was not even known to the party who thus became my debtor.<sup>5</sup> But suppose that a deposit was made to my credit by a stranger, without notice to me. In such case I am not, by the English common law, entitled to bring suit on the deposit which is thus made in my name until I am notified by the depository, and adopt the deposit as for my use,

Party cannot recover unless on duty assumed to himself.

<sup>1</sup> Langdale, M. R., *Colyear v. Mulgrave*, 2 Keen, 98; see *Piercy ex parte*, L. R. 9 Ch. 33; *Tweddle v. Atkinson*, 1 B. & S. 393; see *Segars v. Segars*, 71 Me. 530; *Stoddard v. Ham*, 129 Mass. 383; *Biery v. Ziegler*, 93 Penn. St. 367.

<sup>2</sup> *Curtis v. Parks*, 55 Cal. 106; S. P., *Anderson v. Hamilton*, 25 Penn. St. 75.

<sup>3</sup> *Van Fleet, V. C., Receiver, etc. v. First Nat. Bk.*, 34 N. J. Eq. 457. That A. by paying C.'s debt cannot make himself C.'s creditor, see *Patillo v. Smith*, 61 Ga. 265.

<sup>4</sup> See *infra*, §§ 784 *et seq.*

<sup>5</sup> Wh. on Agency, §§ 4, 5, 147, 398; *infra*, §§ 723 *et seq.*, 784 *et seq.*

he agreeing with me, on sufficient consideration, to hold the deposit for me.<sup>1</sup> There must be, to entitle an alleged creditor to sue, a prior recognition by the creditor of the indebtedness as part of an agreement either express or implied by him with the debtor, that the debtor is to hold for the benefit of the creditor.<sup>2</sup> On the other hand, as will be hereafter seen more fully, the rule in most states in this country is, that a person for whose benefit a contract was made is not precluded from suing on it by the fact that he is not a party to it.<sup>3</sup>—It is worth considering, however, whether our relaxation in this respect of the strictness of the common-law principle is wise. The increasing complexity of our civilization makes it each day the more important to maintain the principle that without privity of contract there can be no contractual relation. It is not likely, in fact, that money will be deposited by a volunteer to my credit, or work done for me, unless for some sinister purpose. I may be a capitalist or a politician, and it may be an object of importance to the party so volunteering to rank me as co-operating in his schemes, or to subject me to him by the ties of gratitude. The true principle is that to establish a contractual relation there must be the consent, express or implied, of the contracting parties. Even supposing that work is done for me or goods supplied to me from motives of disinterested kindness, there are strong

<sup>1</sup> Williams v. Everest, 14 East, 582; Arnold v. Lyman, 17 Mass. 400. The advance in this direction was subsequently checked; and it has been held that on a promise made to the seller by the buyer of an equity of redemption, to secure and cancel the mortgage with the note for which it was given, no action lies by the mortgagee. Mellen v. Whipple, 1 Gray, 317.

<sup>2</sup> *Infra*, § 784; Cobb v. Becke, 6 Q. B. 930; Barlow v. Browne, 16 M. & W. 126; Tweddle v. Atkinson, 1 B. & S. 393; Bigelow v. Davis, 16 Barb. 561. As to novation, see *infra*, § 852; whether members of an association can sue as a committee, see *infra*, § 808.

<sup>3</sup> *Infra*, § 785.

<sup>1</sup> Williams v. Everest, 14 East, 582; Tweddle v. Atkinson, 1 B. & S. 393; Thomas v. Thomas, 2 Q. B. 857; Mandeville v. Welch, 5 Wheat. 277; Hinkley v. Fowler, 15 Me. 285; Gibson v. Cooke, 20 Pick. 18; Brewer v. Dyer, 7 Cush. 337; Exchange Bank v. Rice, 107 Mass. 37; Hind v. Holdship, 2 Watts, 104; Beers v. Robinson, 9 Barr, 229; Page v. Becker, 31 Mo. 466; Fithian v. Monks, 43 Mo. 503; and cases cited *infra*, § 784 *et seq.* In an early Massachusetts case, Felton v. Dickinson, 10 Mass. 287, it was held that a son can maintain an action on a contract made for his benefit with his father. See, also, Felch v. Taylor, 13 Pick. 136;

reasons why this should not be permitted to sustain a suit. (1) Disinterested kindness would cease to exist if it gave a legal claim against the party to whom it is shown. (2) Every man must be left to determine what service he needs in his household, what comfort he requires, what investments he will make. It may be a matter of true charity to supply service or goods to another; but to assert that A. has a right to supply his neighbors with what they need and then exact payment makes A. the master of every family with which he may meddle. In conformity with this view, it has been held that voluntary aid given in securing lost property does not support an action against the party aided;<sup>1</sup> nor does aid in saving property from fire.<sup>2</sup>—On this topic the Roman law takes a different position, it being held in that law, that when aid is given in extremity in relief of an absent person, the party relieving can recover compensation afterwards from the party relieved.<sup>3</sup> No such system of agency, however, is recognized in our jurisprudence. The only exception is that of salvage; it being part of the maritime law that compensation may be obtained for services rendered in saving property from marine loss or from piracy.<sup>4</sup>—Another question to be considered in this connection is, whether a consideration is sufficient of which the party setting it up was not aware at the time he did the act for which he sues. A reward, for instance, is offered for certain services; and a party does this service unconscious of the reward. Can he afterwards recover in a suit on the reward? It has been held in New York that he cannot, there being no contract between the parties.<sup>5</sup> On the other hand, a party who undertakes to do a particular thing without the knowl-

<sup>1</sup> *Nicholson v. Chapman*, 2 H. Bl. 254; *Binsteed v. Buck*, 2 W. Bl. 1117.

<sup>2</sup> *Bartholomew v. Jackson*, 20 Johns. 28.

<sup>3</sup> Wh. on Agency, § 358.

<sup>4</sup> Abb. on Ship. part 4, ch. 12; *Chase v. Corcoran*, 106 Mass. 286, where it was held, that a party claiming and obtaining a boat lost in the water was entitled to recover from the party who brought it to shore the

necessary expenses of preserving the boat.

<sup>5</sup> *Fitch v. Snedaker*, 38 N. Y. 248. In *Williams v. Carwardine*, 4 B. & Ad. 621, apparently *contra*, it does not appear that the party doing the service was ignorant of the reward, though influenced by other motives in doing the service; see *Pollock*, 3d ed. 12, 19; *Leake*, 2d ed. 24; and see cases cited *supra*, § 24.

edge that any other persons will act upon his undertaking, and without inviting other persons so to act, is not liable on his undertaking.<sup>1</sup>

§ 508. We have already considered numerous cases in which agreements have been held inoperative as illegal or against the policy of the law.<sup>2</sup> Wherever a promise is of this type, it is not a valid consideration for another promise.<sup>3</sup> A promise, for instance, to suppress matters defamatory of another, is not a valid consideration, because (1) such matters should be disclosed to the proper public officer, or not disclosed at all, and (2) to permit such agreements would be to sanction black-mailing.<sup>4</sup>

§ 509. For the same reason an illegal consideration vitiates a contract.<sup>5</sup> The engagement of one side being void, the engagement of the other side based on it falls.<sup>6</sup> And where the contract is indivisible, and a part of the consideration is illegal, this vitiates the whole transaction.<sup>7</sup> It is otherwise, as we will presently see, with divisible considerations.<sup>8</sup>

§ 510. When a consideration, after an agreement has been made *bona fide*, becomes impossible of performance, without the fault of the party agreeing to supply it, there being no guaranty against such impossibility

<sup>1</sup> *Ellis v. Clark*, 110 Mass. 389.

<sup>2</sup> *Supra*, §§ 325 *et seq.*

<sup>3</sup> See also *Ham v. Smith*, 87 Penn. St. 63.

<sup>4</sup> *Brown v. Brine*, L. R. 1 Ex. D. 5.

<sup>5</sup> *Supra*, §§ 335 *et seq.*

<sup>6</sup> *Supra*, §§ 338-9; *Benj. on Sales*, 3d Am. ed. § 505; *Ladd v. Dillingham*, 34 Me. 316.

<sup>7</sup> *Supra*, § 339; *Chater v. Beckett*, 7 T. R. 201; *Waite v. Jones*, 1 Bing. N. C. 656; *Hopkins v. Prescott*, 4 C. B. 578; *Howden v. Simpson*, 10 Ad. & El. 793; *Taylor v. Chester*, L. R. 4 Q. B. 309; *Armstrong v. Toler*, 11 Wheat. 258; *Ladd v. Dillingham*, 34 Me. 316; *Roby v. West*, 4 N. H. 285; *Carleton v.*

*Witcher*, 5 N. H. 196; *Prescott v. Norris*, 32 N. H. 101; *Woodruff v. Hinman*, 11 Vt. 592; *Crawford v. Morell*, 8 Johns. 253; *Thayer v. Rock*, 13 Wend. 53; *Barton v. Plank Road*, 17 Barb. 397; *Baldwin v. Palmer*, 6 Selden, 232; *Filson v. Himes*, 5 Barr, 452; *Bly v. Bank*, 79 Penn. St. 453; *Ives v. Bosley*, 35 Md. 262; *Stoutenburg v. Lybrand*, 13 Oh. St. 228; *Collins v. Merrell*, 2 Met. (Ky.) 163; *Chandler v. Johnson*, 39 Ga. 85; *Pettit v. Pettit*, 32 Ala. 288; *Porter v. Jones*, 52 Mo. 399; *Tucker v. West*, 29 Ark. 286; *Cummings v. Saux*, 30 La. An. Part I. 207.

<sup>8</sup> *Infra*, § 511.

on his part, the contract, as we have already seen, falls.<sup>1</sup> How far impossibility at the time of the agreement affects the contract has been distinctively considered.<sup>2</sup>

§ 511. The fact that one of several considerations is invalid or nugatory or impossible does not vitiate an agreement if there remains any one valuable consideration to support the promise. In such case all the invalid and ineffective considerations may be rejected as surplusage.<sup>3</sup> Thus, where a promissory note and a bill of exchange had been given at the same time in payment of a sailor's bill to his landlord, part of which bill included an illegal charge for spirituous liquors, and it appeared that the whole charge for liquors was not equal to one of these securities, it was held by Lord Tenterden that the plaintiff was entitled to recover on the other security.<sup>4</sup> When, also, part of a divisible consideration falls as contravening the statute of frauds, the rest will support a promise.<sup>5</sup> And, as a general rule, where one consideration is nugatory or inoperative, it does not impair liability if a valid consideration remains;<sup>6</sup> and so where there is a divisible agreement to do two things, one legal and the other illegal.<sup>7</sup> It is otherwise, however, when the consideration is entire, and wholly illegal or inoperative.<sup>8</sup>

§ 512. Gratitude for past benefits will not support a promise to repay the benefactor, unless the benefit was in some way

<sup>1</sup> *Supra*, §§ 296 *et seq.*

<sup>2</sup> *Supra*, §§ 298 *et seq.*

<sup>3</sup> Leake, 2d ed. 630; *supra*, §§ 338-9; Metc. Con. 193; Ch. on Con. 11th Am. ed. 69; Shackell v. Rosier, 2 Bing. N. C. 646; King v. Sears, 2 C. M. & R. 48; Goodwin v. Clark, 65 Me. 280; Bliss v. Negus, 8 Mass. 51; Loomis v. Newhall, 15 Pick. 159; Andrews v. Ives, 3 Conn. 368; Hook v. Gray, 6 Barb. 398; Tracy v. Talmage, 14 N. Y. 162; Wiggins v. Keiser, 6 Ind. 252; *infra*, § 338.

<sup>4</sup> Crookshank v. Rose, 5 C. & P. 19; see to same effect Carleton v. Woods, 28 N. H. 290; Robinson v. Green, 3 Met. (Mass.) 159.

<sup>5</sup> Mayfield v. Wadsley, 3 B. & C. 361; *infra*, § 338.

<sup>6</sup> *Supra*, §§ 66, 338; Best v. Jolly, 11 Sid. 38; Jones v. Waite, 1 Bing. N. C. 341; Parish v. Stone, 14 Pick. 198; Earle v. Reed, 10 Metc. 387; Hynds v. Hays, 25 Ind. 31; Treadwell v. Davis, 34 Cal. 601.

<sup>7</sup> Lewis v. Davidson, 4 M. & W. 654; *supra*, § 338.

<sup>8</sup> *Supra*, § 509; Hall v. Dyson, 17 Q. B. 785; Loomis v. Newhall, 15 Pick. 167; Mead v. Combs, 19 N. J. Eq. 112; Floyd v. Goodwin, 8 Yerg. 484; Hall v. Heydon, 41 Ala. 242; Burke v. Murphy, 27 Miss. 167.

conditioned on the promise. We have, it is true, the high authority of Lord Mansfield to the effect that, "where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration;"<sup>1</sup> and for a time this position was accepted by the courts.<sup>2</sup> Where, for instance, a married woman borrowed money on her bond, which was void on account of her coverture, and after her husband's death gave a written promise to pay the debt, it was held that the "moral obligation" incumbent on her to pay the debt, though not one that bound her at the time it was incurred, was a sufficient consideration for the written promise made on her discovery.<sup>3</sup> But it was soon felt that if a moral obligation in one case would sustain a promise, moral obligations in all other cases would have the same effect; and that as in complex conditions of society there are few persons who are not under some sort of moral obligation to those with whom they deal, to treat moral obligations as always a sufficient consideration, would be to do away with the rule by which consideration is required. Hence, Lord Mansfield's opinion that a moral obligation is a consideration to support a contract was soon afterwards abandoned even in his own court;<sup>4</sup> and it is now settled, both in England and the United States, that no merely moral obligation, no matter how strong, can support a promise unless the benefit from which the obligation arises was conditioned on the promise.<sup>5</sup> A promise by a son, for instance, to take an

<sup>1</sup> *Hawkes v. Saunders*, Cowp. 290.

<sup>2</sup> See *Atkins v. Banwell*, 2 East, 506; *Dodge v. Adams*, 19 Pick. 429; *Updike v. Titus*, 2 Beasley, 151; *Lang. Cont.* ii. 1025; 1 *Smith's Lead. Cas.* 7th Am. ed. 284, and see *supra*, § 373.

<sup>3</sup> *Lee v. Muggeridge*, 5 Taunt. 36. This case is overruled in *Eastwood v. Kenyon*, 11 A. & E. 438.

<sup>4</sup> See note to *Wennall v. Adney*, 3 B. & P. 249; *Kaye v. Dutton*, 7 M. & G. 807; *Jennings v. Brown*, 9 M. & W. 501; *Smith v. Ware*, 13 Johns. 259;

*Watkins v. Halstead*, 2 Sandf. 311;

*Geer v. Archer*, 2 Barb. 424.

<sup>5</sup> 1 Ch. Con. 11th Am. ed. 52; *Beaumont v. Reeve*, 8 Q. B. 483; *Warren v. Whitney*, 24 Mo. 561; *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Dearborn v. Bowman*, 3 Met. 155; *Andrews v. Ives*, 3 Conn. 368; *Cook v. Bradley*, 7 Conn. 57; *Stone v. Stone*, 32 Conn. 142; *Smith v. Ware*, 13 Johns. 257; *Ehle v. Judson*, 25 Wend. 97; *Whitaker v. Whitaker*, 52 N. Y. 368; *Snevily v. Reed*, 9 Watts, 390; *Parker v. Carter*, 4 Munf. 273.

extreme case, to pay for support given an aged and destitute parent, is void as without consideration;<sup>1</sup> nor is a father bound by a promise to pay for aid rendered to an adult son during sickness.<sup>2</sup> Even negotiable paper, as between the parties, will not be sustained by a consideration consisting of mere gratitude for a benefit previously conferred.<sup>3</sup> No matter how sacred the duty may be, it will not sustain a promise, unless the one were conditioned on the other, for the courts can no more discriminate between duties more or less sacred, and thus constitute themselves the arbiters of ethics, than they can discriminate between prices more or less adequate, and thus constitute themselves the arbiters of the market.<sup>4</sup> Even an agreement by a man to pay a yearly sum to a woman whom he had seduced to support her in her destitution has on this ground been held inoperative.<sup>5</sup> And a promise made by a

<sup>1</sup> *Cook v. Bradley*, 7 Conn. 57; *Stone v. Stone*, 32 Conn. 142; *Parker v. Carter*, 4 Munf. 473.

<sup>2</sup> *Mills v. Wyman*, 3 Pick. 207; *Ellicott v. Peterson*, 4 Md. 476. That an undertaking for the payment of a son's debts is, by itself, without consideration, see *Mortimore v. Wright*, 6 M. & W. 482; *Seaborne v. Maddy*, 9 C. & P. 497; *Raymond v. Loyl*, 10 Barb. 483; 1 Smith's Lead. Cas. 7th Am. ed. 285.

<sup>3</sup> *Holliday v. Atkinson*, 5 B. & C. 501.

<sup>4</sup> See *Eastwood v. Kenyon*, 11 A. & E. 438; *Chamberlin v. Whitford*, 102 Mass. 448; *Greeves v. McAllister*, 2 Binn. 591; *Kennedy v. Ware*, 1 Barr, 445; *Snevily v. Reed*, 9 Watts, 396; *Pennington v. Gittings*, 2 Gill & J. 208; *Parker v. Carter*, 4 Munf. 273; *Johnston v. Johnston*, 31 Penn. St. 450; *Shealey v. Toole*, 56 Ga. 210; though see *Hemphill v. McClimans*, 24 Penn. St. 367. In *Conmey v. Macfarlane*, Sup. Ct. Penn. 1882, 12 Pitts. Leg. Jour. 411, we have the following: "If one person has been guilty of a wrongful act which would render him liable in damages to another, and he promise

to pay the injured person a sum of money as a compensation, this is a mere gratuitous promise, unless made in consideration of the injured person releasing his right of action for such damages," citing *Smart v. Chell*, 7 Dowl. 781. See, however, *Directors of House of Employment v. Murry*, 32 Penn. St. 178, where it was held that payment for medical services rendered, in a case of necessity, to paupers could, on a *quantum meruit*, be exacted from directors of the poor, under the special legislation of the state imposing on them the duty of supplying medical aid to such paupers; and this though, in this particular case, there was no prior request to the physician to attend the paupers.

<sup>5</sup> *Beaumont v. Reeve*, 8 Q. B. 483; *Hulse v. Hulse*, 17 C. B. 711; and see *Mills v. Wyman*, 3 Pick. 207; *Valentine v. Foster*, 1 Metc. 521; *Dearborn v. Bowman*, 3 Metc. 155; *Ehle v. Judson*, 24 Wend. 97; *Stafford v. Bacon*, 25 Wend. 384; 1 Hill, 533; 2 Hill, 453; *Van Derveer v. Wright*, 6 Barb. 547; *Snevily v. Reed*, 9 Watts, 396; *Kennedy v. Ware*, 1 Barr, 445; *Car-*

woman, after divorce or her husband's death, to pay a debt incurred by her during her marriage is also at common law invalid as without consideration.<sup>1</sup> The same rule has been applied to a promise by a bankrupt, after filing his petition in bankruptcy, and before his discharge;<sup>2</sup> though, as will be seen in the next section, the promise if made after discharge would be valid.<sup>3</sup>—On the same reasoning there is no consider-

man *v. Noble*, 9 Barr, 367, and cases cited 1 Smith's Lead. Cas. 7th Am. ed. 284; though see *Carson v. Ely*, 23 Mo. 267. That the rule in Connecticut differs from the text, see *supra*, § 373. That agreements for illicit cohabitation are invalid, see *supra*, § 373. That agreements to support illegitimate children are invalid, see *infra*, § 525.

<sup>1</sup> *Howe v. Wildes*, 34 Me. 566; *Hayward v. Barker*, 52 Vt. 429; *Watkins v. Halstead*, 2 Sandf. 311; *Felton v. Reid*, 7 Jones N. C. 269; *Waters v. Bean*, 15 Ga. 358; see *Meyer v. Harworth*, 8 A. & E. 467.

<sup>2</sup> *Stebbins v. Sherman*, 1 Sandf. 510; *Groves v. McGuire*, Ky. Ct. Ap. 1881; 1 Ky. L. J. 249; *Nelson v. Stewart*, 54 Ala. 115; though see, *contra*, *Brix v. Braham*, 1 Bing. 281; *Otis v. Gazelin*, 31 Me. 567.

<sup>3</sup> In *Groves v. McGuire*, *ut supra*, it is said by the court: "It is nothing more than a promise to pay a debt already owing and collectible by law, and a renewed assurance to the creditor, without any additional consideration, that the debt will be paid. The original contract remained in full force, and had never been discharged, and as long as the creditors can maintain an action on the original promise, a new promise, without some additional consideration, will not affect an action. That is the rule laid down in *Ogden v. Redd*, 13 Bush, 581, as well as by all the elementary authorities. Suppose the appellees had sued the appellant on the original undertaking, and the

latter, instead of relying on his discharge in bankruptcy, had pleaded, by way of accord and satisfaction, that he had, subsequently to the original promise, say on the — day of March, 1878, made an additional promise to pay the debt, and it was accepted by the defendants, and therefore the last promise, and not the original undertaking, created the liability, can it be successfully maintained that such a plea would be good? We think not. There must be some distinct agreement based upon a consideration in which the original contract is merged or discharged before such a promise can be made available, except for the purpose of defeating a plea of limitation. Where the debt is barred by time or by the bankrupt's discharge, and is no longer collectible by law, a new promise based on the moral obligation to pay, creates a liability; but so long as the original contract can be enforced, a mere promise or recognition of the liability will not support the action. It will not do to say that the mere forbearance to present the claim before the assignee in bankruptcy, gives vitality to the promise and creates an obligation upon which the action can be maintained. The mere conclusion in the mind of the creditor, that he will accept or forbear to act with reference to his claim, will not amount to a contract with his debtor. He must forbear to present his claim by reason of some contract, made by both parties, based upon a consideration, or have been so defraud-



ation for a promise to pay a demand that the plaintiff has voluntarily released in order to make the defendant a witness.<sup>1</sup>

§ 513. An apparent exception to the rule that a moral obligation is not a sufficient consideration to support a promise is to be found in the rule still recognized that the fact that a debt once binding has been discharged by law without satisfaction to the debtor is a sufficient consideration to pay such debt. This has been held where a bankrupt promises to pay a debt discharged in bankruptcy;<sup>2</sup> and *à fortiori* of promises barred by insolvent discharges, such discharges being only locally effective.<sup>3</sup> The same view has been taken in regard to promises

Party, however, may waive benefit of statute relieving him from paying debt.

ed by the debtor as to estop the latter from relying on his defence in bankruptcy. A mere promise to pay is not sufficient. A mere promise to pay a debt already existing cannot be made the foundation of an action. *Gilmore v. Green*, 14 Bush, 772."

<sup>1</sup> *Valentine v. Foster*, 1 Met. 520, and cases cited at close of § 513.

<sup>2</sup> See *Stebbins v. Sherman*, 1 Sandf. 510; *Scouten v. Eislord*, 7 Johns. 36; *Stafford v. Bacon*, 25 Wend. 384; 2 Hill, 353; *Willing v. Peters*, 12 S. & R. 177; *Johns v. Lantz*, 63 Penn. St. 324; *Chambers v. Rubey*, 47 Mo. 99. It would be otherwise if the promise was made before discharge; *supra*, § 512. "The very decided weight of authority holds that a promise made after the debtor has been adjudicated a bankrupt, but before he has obtained his certificate of discharge, is binding. This doctrine is sustained by the following authorities: *Brix v. Braham*, 1 Bing. 281; *Stilwell v. Coope*, 4 Den. 225; *Corliss v. Shepherd*, 28 Me. 550; *Otis v. Gazelin*, 31 Me. 567; *Donnell v. Swaim*, 2 Penn. L. J. 393; *Fraley v. Kelly*, 67 N. C. 78. The contrary doctrine is held by the following authorities, so far as we have been able to discover: *Ingersoll v. Rhoades*,

*Hill & Den. Sup.* 371; *Ogden v. Redd*, 13 Bush. 581." *Day, J., Knapp v. Hoyt*, S. Ct. Iowa, 1881, 13 Rep. 497. In *Shaw v. Burney*, Sup. Ct. N. C. 1882 (14 Law Rep. 182), *Smith, C. J.*, said: "The authorities are clear that to remove the bar of a discharge in bankruptcy and revive the debt, the proof should show a distinct and unequivocal promise to pay, notwithstanding the discharge, and this is the rule announced by this court in *Fraley v. Kelly*, 67 N. C. 78, and approved in *Riggs v. Roberts*, 85 ib. 151. In *Stewart v. Reckless*, 4 Zab. (N. J.) 427, the words relied on were, that he (the defendant) had always told *Stewart* (the plaintiff) he intended to pay him, and the court say 'the expression of an intention to do a thing is not a promise to do it. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry the purpose into effect.' But a case in its essential features the same as that now before the court was decided in 1851 by the supreme court of Massachusetts. *Pratt v. Russell*, 7 Cush. 462."

<sup>3</sup> *Badger v. Gilmore*, 33 N. H. 361; *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. 238; *Erwin v. Saun-*

to pay a debt barred by the statute of limitations. But the validity of promises of this class is no longer placed on the consideration of moral obligation. The liability is now based exclusively on the right of a party to waive the protection of a statute relieving him from indebtedness. "Where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."<sup>1</sup> And it has been held in this country that a promise to pay a debt which has been voluntarily released is void as without consideration.<sup>2</sup>

ders, 1 Cow. 249; *Earnest v. Parke*, 4 Rawle, 452; *Thomas v. Hodgson*, 4 Whart. 492; *Turner v. Crisman*, 20 Ohio, 332; *McWillie v. Kirkpatrick*, 28 Miss. 802.

<sup>1</sup> Per cur. *Earle v. Oliver*, 2 Ex. 90; adopted in *Leake*, 2d ed. 617. To the same effect see *Eastwood v. Kenyon*, 11 A. & E. 447; *Beaumont v. Reeve*, 8 Q. B. 487; *Flight v. Reed*, 1 H. & C. 766; and see *Walbridge v. Harroon*, 18 Vt. 448; *Way v. Sperry*, 6 Cush. 338; *Shepard v. Rhodes*, 7 R. I. 470; *Scouton v. Eislord*, 7 Johns. 36; *Shippey v. Henderson*, 14 Johns. 178; *Geer v. Archer*, 2 Barb. 424; *Ehle v. Judson*, 24 Wend. 97; *Harper v. Fairley*, 53 N. Y. 442; *Turner v. Crisman*, 20 Ohio, 332; *Runnamaker v. Cordray*, 54 Ill. 303; *Simonton v. Clark*, 65 N. C. 525. In *Geer v. Archer*, 2 Barb. 424, it was rightly said: "The test is, could it have been enforced before it was barred by the legal maxim or statute provision." In *Lee v. Muggeridge*, 5 Taunt. 36, however, it was held, as we have seen, that the fact that a woman gave a bond during coverture for money then loaned her will not sustain a promise after her husband's death to pay the money. This case, however, is virtu-

ally overruled in *Eastwood v. Kenyon*, 11 Ad. & El. 438. In England promises to pay debts discharged in bankruptcy are now by statute void. That such is also the case with promises to pay debts which were incurred in infamy, see *supra*, § 43. See discussion in *Lang. Cont.*, ii. 1028; *Leake*, 2d ed. 668; *supra*, § 43.

<sup>2</sup> *Warren v. Whitney*, 24 Me. 561; *Valentine v. Foster*, 1 Met. (Mass.) 520; *Hale v. Rice*, 124 Mass. 292; *Shepard v. Rhodes*, 7 R. I. 470; *Snevily v. Reed*, 9 Watts, 396; though see, *contra*, *Hemphill v. McClimans*, 24 Penn. St. 367; *Willing v. Peters*, 12 S. & R. 177. In *Ingersoll v. Martin*, Ct. of Ap. Md. 1882, 13 Rep. 782, it is held that a promise to pay a released debt is void for want of consideration, following *Warren v. Whitney*, 24 Me. 561; *Shepard v. Rhodes*, 7 R. I. 470; *Montgomery v. Lampton*, 3 Met. Ky. 519; and dissenting from *Willing v. Peters*, 12 S. & R. 177. In *Metc. on Cont.* 179, after citing *Valentine v. Foster*, 1 Met. (Mass.) 520, it is said: "The distinction taken in this case between the validity of a promise to pay a claim that is discharged by operation of positive law, and a claim that

—In connection with the position before us may be cited the rulings of the courts that parties to negotiable paper, discharged for want of notice of dishonor, become liable, if, after notice of such discharge, they promise payment.<sup>1</sup> Whether the party promising had notice is to be inferred from all the facts in the case.<sup>2</sup>—Under the same head are sometimes classed promises by infants, which, it is alleged, are subject to ratification when they reach majority, and promises of married women renewed after divorce or their husband's death. But the analogy with the case of an infant fails from the fact that the promise on his part, according to the better view, always bound, though not capable of enforcement during his minority, and was subject to repudiation upon his majority.<sup>3</sup> A married woman's promise, on the other hand, is at common law a nullity, which no subsequent promise can resuscitate.<sup>4</sup>

§ 514. An executed act (*i. e.*, an act already performed) cannot constitute a valid consideration unless a request to perform such act be proved. That a benefit has been conferred on me, for instance, without my request, is not a valid consideration for a promise on my part to confer a benefit on the person from whom the benefit to me proceeded. No matter how morally obligatory on me may be the duty of repaying the kindness done me, not only am I not obliged in law to repay it, but a promise

An executed act not a valid consideration.

is released or otherwise discharged by the voluntary act of the claimant, has been recognized and applied by other courts. See *ex parte* Hall, 1 Deacon, 171; *Stafford v. Bacon*, 1 Hill, N. Y. 532; *Warren v. Whitney*, 24 Me. 562; *Lewis v. Simons*, 1 Handy, 82; *Montgomery v. Lampton*, 3 Met. (Ky.) 519; *Shepard v. Knowles*, 7 R. I. 474; *contra*, *Willing v. Peters*, 12 S. & R. 177." As generally sustaining the text, see 1 Ch. on Con. 11th Am. ed. 69; *Eastwood v. Kenyon*, 11 A. & E. 438; *Streeter v. Horlock*, 1 Bing. 34; *Oakes v. Cushing*, 24 Me. 313; *Manter v. Churchill*, 127 Mass. 31; *Bulkley v. Landon*, 2 Conn. 404; *Chaffee v. Thomes*, 7 Cow. 358. That a release

absolutely discharges a debt, see *infra*, § 1034.

<sup>1</sup> *Lundie v. Robertson*, 7 East, 231; *Gibbon v. Coggon*, 2 Campb. 188; *Pickin v. Graham*, 1 C. & M. 725; *Byram v. Hunter*, 36 Me. 217; *Andrews v. Boyd*, 3 Met. 434; *Breed v. Hillhouse*, 7 Conn. 523; *Dorsey v. Watson*, 14 Miss. 59.

<sup>2</sup> 3 Kent, 113; 1 Ch. on Cont. 55, citing, among other cases, *Sigerson v. Matthews*, 20 How. U. S. 496; *Thorn-ton v. Wynn*, 12 Wheat. 183; *Farrington v. Brown*, 7 N. H. 271; *Andrews v. Boyd*, 3 Met. 434; *Tebbetts v. Dowd*, 23 Wend. 379.

<sup>3</sup> See *supra*, §§ 29 *et seq.*

<sup>4</sup> *Supra*, § 512.

on my part to repay it, if I did not request it, is void for want of consideration.<sup>1</sup> The reasons may be thus stated: (1) To banish expressions of gratitude from conversation would be to impose on conversation an insufferable burden, yet expressions of gratitude would have to be suppressed if they were the subjects of suits in courts of justice. (2) In the long run, the welfare of society is more promoted by a system in which it is understood that acts of kindness are gratuitous, than it would be were it understood that when a benefit is conferred and acknowledged then a suit could be maintained on the acknowledgment. (3) To make an executed act a consideration would be to virtually declare that considerations are not necessary in cases of prior dealings between the parties, and hence to do away with the entire sanction of consideration. After a benefit, no matter how great, has been received, and the transaction is terminated, the plaintiff suffers the same detriment, and the defendant retains the same advantage, whether the promise is made or not. The past is irrevocably closed, and the promise to repay or to recompense stands by itself as gratuitous. Supposing that he has nothing to gain by promising, and nothing to lose by refusing to promise, his promise is a mere voluntary act. (4) If a past consideration will support a promise at all, it will support a promise at any future period; if it will not support a promise at any future period, which is conceded, it ought not to support a promise at all.<sup>2</sup>—In some of the old English cases it is

<sup>1</sup> *Supra*, § 494; Leake, 2d ed. 19; Eliz. 741; Riggs v. Bullingham, Cro. Rann v. Hughes, 7 T. R. 350; Roscorla Eliz. 715; Townsend v. Hunt, Cro. v. Thomas, 3 Q. B. 234; Hopkins v. Car. 408; Lampleigh v. Brathwaite, Logan, 5 M. & W. 241; Eastwood v. Hob. 106—are shown by Mr. Langdell Kenyon, 11 A. & E. 438; Lonsdale v. to have been on this point clearly Brown, 4 Wash. C. C. 148; Comstock overruled. v. Smith, 7 Johns. 87; Parker v. As an illustration of the rule above Crane, 6 Wend. 649; Johnston v. stated may be mentioned an Iowa case Johnston, 31 Penn. St. 450; Chambers in 1880, where C. contracted with a v. Davis, 3 Whart. 40; Hopkins v. railroad company to build by a particular Richardson, 9 Grat. 485; McMahan v. time an extension of the track. Geiger, 73 Mo. 145. The contract turned out badly, and C. incurred great losses. The company then agreed to pay any debts that C. had incurred in the prosecution of the

<sup>2</sup> See Lang. Cont. ii. 1035 *et seq.* The older cases—Pearle v. Edwards, 1 Leon. 102; Barker v. Halifax, Cro.

held that an executed benefit, if requested, is a sufficient consideration to sustain a promise. If I receive, for instance, goods or service which I previously requested, then a promise on my part to pay for such goods or service will be held to be on a sufficient consideration. But this position cannot be sustained. Either my request implied a promise to pay or it did not. If it did, then the suit must be brought on the request, thus implying the promise. If it did not, then my promise, after the benefit has been received, is without consideration. If, to illustrate this distinction, I order goods from a grocer whom I am dealing with on the basis of paying for what I take, then my order implies a promise to pay; and when he sues me, he sues on this implied promise.<sup>1</sup> On the other hand, if I ask a member of my family to do me a service, such a request does not imply a promise to pay;<sup>2</sup> and not only can no suit be brought for such service, but a subsequent promise to pay for it, after the service has been received, is without consideration.<sup>3</sup>—The question whether there was a promise to pay concurrent with the acceptance of the goods or services is to be determined from all the circumstances of the case; and where a party accepts a benefit knowing it is one for which payment is expected to be made, then a promise to pay may be inferred.<sup>4</sup>—Where the facts in the pleading sustain the implication, there need be no express averment of request.<sup>5</sup>—An express promise made subsequent to an executed consideration will not be sustained if it is essentially different from the promise which the law implies from the same consideration.<sup>6</sup> Thus a promise to pay

work. It was held that this agreement was without consideration. *Ayres v. R. R.*, 52 Iowa, 478. Had the agreement been in consideration of the contractor resuming work, the law would have been otherwise. See *infra*, §§ 852 *et seq.*

<sup>1</sup> *Supra*, § 7.

<sup>2</sup> *Infra*, § 719.

<sup>3</sup> See *Metc. on Cont.* 194; *Lampleigh v. Brathwaite*, Hob. 105; *S. C.*, 1 *Smith's Lead. Cas.* 7th Am. ed. 280; *infra*, §§ 709 *et seq.*

<sup>4</sup> *Supra*, § 7; *infra*, §§ 709 *et seq.*; 1 *Saund.* 264, note; *Metc. on Cont.* 200; *Wilson v. Edmonds*, 4 *Foster*, 546; *Oatfield v. Waring*, 14 *Johns.* 192.

<sup>5</sup> *Infra*, §§ 709 *et seq.*; *Comstock v. Smith*, 7 *Johns.* 88; *Hicks v. Burhaus*, 10 *Johns.* 243; *Doty v. Wilson*, 14 *Johns.* 382.

<sup>6</sup> 2 *Ch. on Cont.* 11th Am. ed. 71; *Kaye v. Dutton*, 7 *M. & G.* 807; *Roscorla v. Thomas*, 3 *Q. B.* 234; *Jackson v. Cobbin*, 8 *M. & W.* 790.

on a future day cannot ordinarily be sustained on an account stated, though a general request to pay may be inferred;<sup>1</sup> nor is a promise of warranty, after a perfected sale, sustainable when from the mere fact of sale no such promise can be inferred.<sup>2</sup>

§ 515. It may be, however, that a consideration is only part performed, as where one party agrees to do another a continuous service, and while this service has been begun but has not yet been completed, the party benefited promises to pay for it.<sup>3</sup> Under this rule, a promise for the support of an illegitimate child is retrospective as well as prospective;<sup>4</sup> and so of marriage.<sup>5</sup> The same view has been taken in regard to the consideration of a lessee permanently occupying and paying rent.<sup>6</sup> Promises made in respect to existing debts, also, when the obligation of such debts continues, though they may not be technically suable, are to be regarded as made on a continuous consideration.<sup>7</sup> The same rule was held where the plaintiff declared that, in consideration he had bought three parcels of land in a particular day, the defendant afterwards promised to make him a sufficient assurance; the assurance being the substance of the sale.<sup>8</sup> But a mere tenancy from year to year is not sufficient to sustain a promise to put on any repairs which are not the ordinary duty of a landlord.<sup>9</sup>—A continuous guaranty is, from the nature of the case, a continuing consideration; and a continuous guaranty is one which is meant to remain in force until terminated by its own limitations, or by notice.<sup>10</sup>

<sup>1</sup> Hopkins v. Logan, 5 M. & W. 241.

<sup>2</sup> Roscorla v. Thomas, 3 Q. B. 234.

<sup>3</sup> Metc. on Cont. 202; Cotten v. Westcott, 3 Bulst. 187; Pearle v. Unger, Cro. Eliz. 94; 1 Leon. 102; Carroll v. Nixon, 4 W. & S. 517; Carman v. Noble, 9 Barr, 366. As to continuous promises, see *supra*, §§ 9-14.

<sup>4</sup> Shenk v. Mingle, 13 S. & R. 29; Maurer v. Mitchell, 9 W. & S. 69; Wiggins v. Keizer, 6 Ind. 252.

<sup>5</sup> Bac. Ab. Ass. D., Marsh v. Rainsford, 2 Leon. 111; *infra*, § 537.

<sup>6</sup> Pearle v. Unger, Cro. Eliz. 94; S.

C., 1 Leon. 102; 1 Ch. on Cont. 11th Am. ed. 73.

<sup>7</sup> *Supra*, § 513; 1 Ch. on Cont. 11th Am. ed. 74; 2 Steph. Com. 114; Hodge v. Vavisor, 1 Roll. R. 413.

<sup>8</sup> Warcop v. Morse, Cro. Eliz. 138.

<sup>9</sup> 1 Ch. on Con. 11th Am. ed. 74; Brown v. Crump, 1 Marsh. 567; Horsefall v. Mather, Holt, N. P. 7.

<sup>10</sup> Brandt on Suretyship, §§ 130 *et seq.*; Heffield v. Meadows, L. R. 4 C. P. 595; Nottingham Hide Co. v. Bothrill, L. R. 8 C. P. 694; Mussey v. Rayner, 22 Pick. 223; Boston, etc. Glass Co. v.

§ 516. That a consideration should be required to sustain a promise, and yet that the amount of this consideration should be a matter as to which, unless fraud or undue influence be set up, the courts will not adjudicate, seems unreasonable; yet it must be remembered that if the courts were required to determine in each case whether the consideration was adequate, prices would have to be fixed not by parties, but by courts. A consideration, it is said by Tindal, C. J., is sufficient if it consists of "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant."<sup>1</sup> And as sufficient considerations have been held the dating an account,<sup>2</sup> the showing of a deed,<sup>3</sup> and the making an affidavit in exposition of a case,<sup>4</sup> the parting with a letter which belonged to the promisee,<sup>5</sup> the trust manifested in a bailee by depositing with him goods for delivery.<sup>6</sup>

Amount of consideration not material.

Moore, 119 Mass. 435; Melendy v. Capen, 120 Mass. 222; Hotchkiss v. Barnes, 34 Conn. 29; Carrol v. Nixon, 4 W. & S. 517; Carman v. Noble, 9 Barr, 366; and see as instances Wood v. Priestner, L. R. 2 Ex. 282; Hitchcock v. Humfrey, 5 M. & G. 559; Burgess v. Eve, L. R. 13 Eq. 450.

<sup>1</sup> Tindal, C. J., *Laythorp v. Bryant*, 3 Scott, 250; citing Selwyn's N. P., tit. "Assumpsit;" adopted in Leake, 2d ed. 611; 1 Ch. on Con. 11th Am. ed. 29. That detriment is essential see *supra*, § 505.—That its amount is immaterial, see *Westlake v. Adams*, 5 C. B. N. S. 248; *Harrison v. Guest*, 8 H. L. Ca. 481; *Erwin v. Parham*, 12 How. 197; *Slater v. Maxwell*, 6 Wall. 273; *Nash v. Lull*, 102 Mass. 60; *Lee v. Kirby*, 104 Mass. 420; *Rutgers v. Lucet*, 2 John. Ca. 92; *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 N. Y. 596; *Wintermute v. Snyder*, 2 Green. Ch. 489; *Weber v. Weitling*, 3

*C. E. Green*, 441; *Harlan v. Harlan*, 20 Penn. St. 303; *Cummings's App.*, 67 Penn. St. 404; *Duncan v. Sanders*, 50 Ill. 475; *Stevenson v. Robertson*, 55 Iowa, 689; *Butler v. Haskell*, 4 Desaus. 651; *Woodruff v. McDonald*, 33 Ark. 97. In *Brooks v. Haigh*, 10 Ad. & El. 323, it was held that a piece of paper on which a void contract is drawn is a sufficient consideration for a guaranty of 10,000*l*.

<sup>2</sup> *Haws v. Smith*, 2 Lev. 122.

<sup>3</sup> *Sturlyn v. Albany*, Cro. Eliz. 67.

<sup>4</sup> *Brooks v. Ball*, 18 John. 337.

<sup>5</sup> *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; *Lang. Cont.* 1016.

<sup>6</sup> *Supra*, § 505. And see generally to same effect *Coles v. Trecothick*, 9 Ves. Jun. 246; *Murray v. Palmer*, 2 Sch. & Le. 468; *Eyre v. Potter*, 15 How. 42; *Bedel v. Loomis*, 11 N. H. 9; *Howard v. Edgell*, 17 Vt. 9; *Park v. Johnson*, 4 Allen, 266. That "the smallest spark" of consideration will suffice,

"If a contract is deliberately made without fraud and with full consideration of all the circumstances, the least consideration will be sufficient."<sup>1</sup>

§ 517. Whether a party has made a good or bad bargain, supposing he was *capax negotii*, and there was no fraud, is not a question for the adjudicating tribunal to determine. Every person competent to do business must decide for himself whether the price he receives for a particular object is sufficient to induce him to part with it. What may be very inadequate to the mind of a stranger may be adequate to me. There may be particular reasons why I want to buy particular property or to obtain the services of a particular agent; and these reasons I alone can weigh. If I choose, on the other hand, to sell a property at less than its supposed market value, it must be remembered that I know best what it really is; and beside this, there may be reasons, also peculiar to myself, for selling to the particular vendee. Aside from this, for a court to determine the adequacy of prices would be in conflict with the established economical rule that by parties in business alone can prices be justly fixed. Hence, it is a settled principle that "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced."<sup>2</sup> The rule is applied in equity as well as in

see *Austyn v. McLure*, 4 Dall. 226; 20 Penn. St. 303; *Davidson v. Little*, *Greaves v. McAllister*, 2 Binn. 591; 22 Penn. St. 245. As to setting aside *Harlan v. Harlan*, 20 Penn. St. 303. contract for inadequacy of consideration, see *supra*, §§ 165, 239; *infra*, §

<sup>1</sup> *Wilde, J., Train v. Gould*, 5 Pick. 384, cited *Read v. Hitchings*, 71 Me. 596. To same effect see *Nash v. Lull*, 102 Mass. 60; *Howe v. Richards*, 102 Mass. 64*n*; *Hardisty v. Smith*, 3 Ind. 41.

<sup>2</sup> Per cur. in *Bolton v. Madden*, L. R. 9 Q. B. 57; adopted in *Leake*, 2d ed. 613; *Bainbridge v. Firmstone*, 8 A. & E. 743. See to same effect *Skeate v. Beale*, 11 A. & E. 983; *Lawrence v. McCalmont*, 2 How. 426; *Newhall v. Paige*, 10 Gray, 366; *Leonard v. Vredenburg*, 8 Johns. 29; *Cowel v. Cornell*, 75 N. Y. 91; *Harlan v. Harlan*,

contract for inadequacy of consideration, see *supra*, §§ 165, 239; *infra*, § 518. As illustrations, Mr. Pollock cites *Bainbridge v. Firmstone*, 8 A. & E. 743, in which it was held that if a man who owns two boilers allows another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant," said Lord Denman, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition." We need not inquire



law.<sup>1</sup>—That the giving up of goods to a bailee is a sufficient consideration for a promise on his part to keep them safely, has been already shown.<sup>2</sup>—When there are conflicting constructions assignable to a disputed consideration, that will be accepted which is most consistent with good faith.<sup>3</sup>

§ 518. Although the courts will not determine the question of the adequacy of a consideration, if the issue be presented singly, yet, if the issue of fraud be raised, the adequacy of consideration is of decisive importance. Where the consideration is grossly inadequate, and where the party reaping the advantage had in any way authority or influence over the other party, then, as we have seen, the bargain is one which a court of equity will not only refuse to execute, but will rescind.<sup>4</sup> Gross inadequacy of consideration, by itself, therefore, is not ground for setting aside a conveyance, but it may be of controlling moment in determining whether a conveyance was fraudulent.<sup>5</sup> A court of equity, also, will not give its aid to the enforcement of a bar-

Gross inadequacy may be ground to set aside.

what benefit he expected to derive. In *Sykes v. Chadwick*, 18 Wall. 141, also, a release of a supposed right of dower, though actually unfounded, was held a good consideration. In *Gravelly v. Barnard*, L. R. 18 Eq. 518, it was held that an agreement to continue an existing service terminable at will is a good consideration.

<sup>1</sup> *Pollock*, 159; 1 Ch. on Cont. 11th Am. ed. 30; 1 Sug. V. & P. 8th Am. ed. 273; *Cheale v. Kenward*, 3 De G. & J. 27; *Taylor v. Manners*, L. R. 1 Ch. 48; *Lee v. Kirby*, 104 Mass. 420; *Osgood v. Franklin*, 2 John. Ch. 23; *Haines v. Haines*, 6 Md. 435; *Comstock v. Purple*, 49 Ill. 158; *Harrison v. Town*, 17 Mo. 237; *Davidson v. Little*, 22 Penn. St. 245.

<sup>2</sup> *Supra*, § 505.

<sup>3</sup> *Infra*, § 654.

<sup>4</sup> See *supra*, §§ 157–165, 239; and see *Borell v. Dann*, 2 Hare, 450; *Summers v. Griffiths*, 35 Beav. 27; *Hamet v. Dun-*

*das*, 4 Barr, 178; *Madison Co. v. People*, 58 Ill. 456; *Case v. Case*, 26 Mich. 484; as to proof of fraud see *supra*, § 239.

<sup>5</sup> *Supra*, §§ 157 *et seq.*, 239, 376 *et seq.*; *Kerr on Fraud and Mist.* 187; *Gwynne v. Heaton*, 1 Bro. C. C. 5; *Emigrant Co. v. Wright Co.*, 97 U. S. 339; *Shepard v. Rhodes*, 7 R. I. 470; *Byers v. Surget*, 19 How. 303; *Eastman v. Plumer*, 46 N. H. 464; *Dunn v. Chambers*, 4 Barb. 376; *Osgood v. Franklin*, 2 Johns. Ch. 23; S. C., 14 Johns. 527; *Melick v. Dayton*, 34 N. J. Eq. 245; *Johnson v. Dorsey*, 7 Gill, 269; *M'Kinney v. Pinckard*, 2 Leigh, 149; *Judge v. Wilkins*, 19 Ala. 765; *Morris v. Philliber*, 30 Mo. 145; *Mitchell v. Jones*, 50 Mo. 435; *Schnell v. Nell*, 17 Ind. 29 (a promise to pay \$600 in consideration of one cent). As to unconscionable and catching bargains see *supra*, § 169.

gain which is peculiarly hard and unconscionable.<sup>1</sup> Of this rule we have an instance in a Kansas case, decided in 1880. I. held a life-insurance policy for his wife's benefit, and then joined with his wife in assigning the policy to C., a creditor. C. paid the after-accruing premiums, and when the policy was mature, demanded the amount due. The company refused to pay until a blank receipt on the back of the policy was filled up by I.'s wife. This, however, she refused to do unless C. agreed in writing to pay her a large sum of money. It was held that this sum, bearing no reasonable proportion to the loss sustained, was to be regarded as exorbitant, and the agreement was held inoperative as unconscionable.<sup>2</sup>

§ 519. It is also to be observed that while courts will not undertake to determine prices, a consideration that is necessarily and absolutely valueless will be regarded as insufficient.<sup>3</sup> Hence a covenant by a grantee of land that he will build on the land such a house as he thought fit, as it does not bind him to anything, is not a sufficient consideration to sustain the deed against subsequent purchasers for value from the grantor;<sup>4</sup> and so, as we have seen, it has been held that a promise to do what a party is already bound to do is no consideration for a promise in return.<sup>5</sup> And utter inadequacy may lead to the inference of fraud.<sup>6</sup>

§ 520. When the consideration on which a promise is made fails absolutely, then the promise becomes inoperative. This is the case when, after the bargain, the

<sup>1</sup> *Supra*, §§ 165, 239 *et seq.*; Bisham's Eq. § 374; 2 Ch. on Con. 11th Am. ed. 31; 1 Sug. V. & P. 8th Am. ed. 275; Tennent v. Tennent, L. R. 2 Sc. Ap. 6; Falcke v. Gray, 4 Drew. 651; Willard v. Tayloe, 8 Wal. 557; Howard v. Edgell, 17 Vt. 9; Kidder v. Chamberlin, 41 Vt. 62; Osgood v. Franklin, 2 Johns. Ch. 23; 14 Johns. 527; Seymour v. Delancy, 3 Cow. 445; Hough v. Hurst, 2 Ohio, 495; Williams v. Powell, 1 Ired. Eq. 460; Butler v. Haskell, 4 Dessaus. 651; Gasque v. Small, 2 Strobb. 72.

<sup>2</sup> Kelley v. Caplice, 23 Kan. 474; see also Botkin v. Livingston, 21 Kan. 232, as another case of an unconscionable bargain.

<sup>3</sup> Ch. on Con. 11th Am. ed. 29; Sykes v. Dixon, 9 Ad. & E. 693; Cabot v. Haskins, 3 Pick. 83; Pfeiffer v. Adler, 37 N. Y. 164; Maull v. Vaughan, 45 Ala. 134.

<sup>4</sup> Rosher v. Williams, L. R. 20 Eq. 210.

<sup>5</sup> *Supra*, § 500.

<sup>6</sup> *Supra*, §§ 165, 239.

essential character of the consideration is destroyed;<sup>1</sup> supposing that this is not attributable in any way to the misconduct of the promisor;<sup>2</sup> or that the risk is not one against which he guarantees.<sup>3</sup> The acceptance, by the receiver, of money on any kind of trust, exposes him to a suit for its recovery, the trust being a sufficient consideration.<sup>4</sup> Hence, when the consideration totally fails, and there is a warranty either express or implied, the purchaser is entitled to rescind, and recover back the price.<sup>5</sup> This is *a fortiori* the case where there is a breach of warranty of title.<sup>6</sup> And a promise made under a mistake as to legal liability, when such mistake is the consideration of the promise, is inoperative from failure of consideration.<sup>7</sup>—Even where there is no express warranty of title, the prevalent opinion is, that a party selling goods as his own gives an implied warranty of title;<sup>8</sup> and that total failure of title is a defence to a suit for purchase money.<sup>9</sup>—It has also been held, that the price of goods sold which the seller fails to deliver may be recovered back;<sup>10</sup> and so of money paid as a deposit on application for shares in a projected company which is subsequently abandoned;<sup>11</sup> and so of money paid to a corporation on an undertaking which

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may be re-  
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back.

<sup>1</sup> *Supra*, § 300.

<sup>2</sup> *Supra*, § 309.

<sup>3</sup> *Supra*, § 361.

<sup>4</sup> *Whitehead v. Greetham*, 2 Bing. 464; *Shillibeer v. Glyn*, 2 M. & W. 143.

<sup>5</sup> *Infra*, §§ 521, 742 *et seq.*; *Benj. on Sales*, 3d Am. ed. § 423; *Giles v. Edwards*, 7 T. R. 181; *Howe Machine Co. v. Willie*, 85 Ill. 333. That this is the case with money paid on an abandoned adventure, see *infra*, § 742; and with money paid for worthless securities, see *infra*, § 744.

<sup>6</sup> *Infra*, § 746; *supra*, § 214; *Eichholz v. Banister*, 17 C. B. N. S. 708; *Chapman v. Speller*, 14 Q. B. 621.

<sup>7</sup> *Supra*, §§ 177 *et seq.*; *infra*, § 747; *Warder v. Tucker*, 7 Mass. 449; *Cabot v. Haskins*, 3 Pick. 83. As to error in law, see *supra*, §§ 198 *et seq.*

<sup>8</sup> *Supra*, § 230; *infra*, §§ 742 *et seq.*

<sup>9</sup> *Metc. on Cont.* 219; *Tillotson v. Grapes*, 4 N. H. 448; *Rice v. Goddard*, 14 Pick. 293; *Bierce v. Stocking*, 11 Gray, 174; *Trask v. Vinson*, 20 Pick. 110; *Cook v. Mix*, 11 Conn. 432; *Frisbee v. Hoffnagle*, 11 Johns. 50; *Tyler v. Young*, 2 Scam. 447; *Logan v. Matthews*, 6 Barr, 417; *Geiger v. Cook*, 3 W. & S. 266; *Davis v. McVickers*, 11 Ill. 327; *People v. Sisson*, 98 Ill. 335; *Sturgis Bk. v. Peck*, 8 Kan. 660; see to the question of recovery on failure of title, *supra*, § 214; *infra*, §§ 746, 919.

<sup>10</sup> *Devaux v. Conolly*, 8 C. B. 640; see *supra*, §§ 190 *et seq.*, 300.

<sup>11</sup> *Walstab v. Spottiswoode*, 15 M. & W. 501; *Johnson v. Goslett*, 3 C. B. N. S. 569; *Watson v. Charlemont*, 12 Q. B. 856; *infra*, § 742.

was *ultra vires*;<sup>1</sup> and so of money paid on void bills, or on bills or securities turning out to have been forged;<sup>2</sup> and so of money paid for articles turning out to be valueless.<sup>3</sup> But a party who buys on a speculation which fails cannot, in cases where there was no fraud or imposition, either refuse to pay for the thing purchased, or recover back its price if paid, because it turns out not to be what he expected.<sup>4</sup>—Whether on a partial failure of consideration there can be a recovery back will be hereafter considered.<sup>5</sup>

§ 521. But where an unliquidated debt is liquidated, and a new promise is made to pay the sum thus assessed, a release of the unliquidated claim is a sufficient consideration to sustain the new promise.<sup>6</sup> And a payment of a smaller sum in hand may be a sufficient consideration for the discharge of a larger unliquidated sum.<sup>7</sup>—As a general rule a reconstruction of an old agreement is a sufficient consideration for the new agreement which the reconstruction contains.<sup>8</sup>

Release of unliquidated debt a sufficient consideration for promise to pay specific sum.

One consideration may support several promises.

§ 522. One and the same consideration may support several successive promises, or several promises to distinct persons.<sup>9</sup>

§ 523. As has been already incidentally observed, and as will be hereafter noticed in detail, a promise is a sufficient consideration for a promise. And when promises are thus mutually dependent, either can

Promise may support promise.

<sup>1</sup> Alison's case, L. R. 9 Ch. 24; *supra*, §§ 135 *et seq.*

<sup>2</sup> *Infra*, § 744; Jones *v.* Ryde, 5 Taunt. 488; Gurney *v.* Womersley, 4 E. & B. 133; Westropp *v.* Solomon, 8 C. B. 345.

<sup>3</sup> *Supra*, §§ 282 *et seq.*; *infra*, § 746; Tillotson *v.* Grapes, 4 N. H. 448; Vaughan *v.* Porter, 16 Vt. 266; Dickinson *v.* Hall, 14 Pick. 217; Hotchkiss *v.* Judd, 12 Allen, 447; Chapman *v.* Brooklyn, 40 N. Y. 372; Davis *v.* McVickers, 11 Ill. 327; Wharton *v.* O'Hara, 2 Nott & McC. 65.

<sup>4</sup> *Infra*, § 749; *supra*, §§ 282, 519; Erwin *v.* Parkham, 12 How. 97; Forbes

*v.* Appleton, 5 Cush. 117; Lamert *v.* Heath, 15 M. & W. 487.

<sup>5</sup> *Infra*, § 748.

<sup>6</sup> *Infra*, §§ 937, 1000; Wilkinson *v.* Byers, 1 A. & E. 106.

<sup>7</sup> Longridge *v.* Dorville, 5 B. & Ald. 117; Palmerton *v.* Huxford, 4 Denio, 166; Howard *v.* Norton, 65 Barb. 161. For other cases, see *infra*, §§ 937, 1000.

<sup>8</sup> *Infra*, §§ 858 *et seq.*; *supra*, §§ 505, 533; Cutter *v.* Cochrane, 116 Mass. 408; Rollins *v.* Marsh, 128 Mass. 116; Brown *v.* Everhard, 52 Wis. 205.

<sup>9</sup> Leake, 614; citing Harris *v.* Venables, L. R. 7 Ex. 235.

be sued on by the party to whom the promise is made, supposing him to be in no default.<sup>1</sup> Each party, in such case, must be bound, as otherwise there is no mutuality, and no contract;<sup>2</sup> though, as we will presently see, an obligation may be contingent.<sup>3</sup> As illustrations of promises thus made in consideration of each other may be mentioned marriage promises;<sup>4</sup> promises of exchange of work;<sup>5</sup> promises of sale and purchase;<sup>6</sup> promises to transfer and to accept unpaid shares in a railroad company;<sup>7</sup> promises to receive a partner on consideration of becoming a partner.<sup>8</sup>—Promises thus to sustain each other must be simultaneous. If one has been executed by reception of the thing promised, it takes the shape of a benefit received, and is not, therefore, a good consideration. The promises, to sustain each other, must be interdependent. It does not follow from this, however, that the promises must take their origin at the same time. One may have been made a long time ago, the other may have been made only a few moments since. All that is necessary is that they should be renewed and reaffirmed at the time of the inception of the contract. “I will promise to do a particular thing if you will promise to do a certain other thing.” If this be agreed to by the party addressed, there is a contract. There would be no contract, however, if one party should say, “because some

<sup>1</sup> *Wilkinson v. Byers*, 1 A. & E. 106; *Ired.* 257; *Martin v. Black*, 20 Ala. 309; *Hartzell v. Saunders*, 49 Mo. 433; *see Holmes's Common Law*, 305.

*Bolton v. Madden*, L. R. 9 Q. B. 55; *Phillips v. Preston*, 5 How. U. S. 278; *Appleton v. Chase*, 19 Me. 74; *Dockray v. Dunn*, 37 Me. 442; *Robinson v. Batchelder*, 4 N. H. 40; *Quarles v. George*, 23 Pick. 401; *Burr v. Wilcox*, 13 Allen, 269; *Cottage St. Ch. v. Kendall*, 121 Mass. 528; *Tucker v. Woods*, 12 John. 120; *Briggs v. Sizer*, 30 N. Y. 647; *Coleman v. Eyre*, 45 N. Y. 38; *Giles v. Ackles*, 9 Barr, 147; *Kiester v. Miller*, 25 Penn. St. 481; *Carrier v. Dilworth*, 59 Penn. St. 406; *Watkins v. Hodges*, 6 Har. & J. 38; *Funk v. Hough*, 29 Ill. 145; *Colgin v. Henley*, 6 Leigh, 85; *Whitehead v. Potter*, 4

*Hopkins v. Logan*, 5 M. & W. 241; *Dorsey v. Packwood*, 12 How. 126; *Ewins v. Gordon*, 49 N. H. 444; *supra*, § 2.

<sup>2</sup> *Infra*, §§ 524, 549.

<sup>3</sup> *Wightman v. Coates*, 15 Mass. 1; *Willard v. Stone*, 7 Cow. 22; *infra*, § 537.

<sup>4</sup> *Davis v. Petit*, 27 Vt. 216.

<sup>5</sup> *Appleton v. Chase*, 19 Me. 74; *infra*, § 549.

<sup>6</sup> *Cheale v. Kenward*, 3 De G. & J. 27.

<sup>7</sup> *McNeill v. Reid*, 9 Bing. 68.

time ago you promised to do a particular thing, I now promise to do the other thing.”<sup>1</sup>—Promises, therefore, to thus lend support to each other, must be reciprocally dependent. When forming an oral contract, they must be simultaneous. If one promise is not made until the other is complete, one is not the consideration for the other, even though they were made on the same day.<sup>2</sup> If made in a written correspondence, the acceptance must be conditioned on the proposal.<sup>3</sup> They must therefore be, in the eye of the law, made at the same moment of time, as otherwise both will be without consideration. If one is a nullity, the other falls.—The promise, also, relied on as a consideration must be legally effective.<sup>4</sup> “A promise may be a good consideration for a promise; as a promissory note or acceptance for another promissory note or acceptance. But the promise which shall form a valid consideration must be such a one as the promisee may have in hand to enforce by law.”<sup>5</sup> It may be said, in answer to this, that an infant is not bound on his contract, yet such contract may bind those contracting with him. But an infant’s contracts are not void, since he may ratify them when of full age, or waive the defence of infancy.<sup>6</sup> Such promises, also, must be to do a possible thing, since an impossible promise is a nullity,<sup>7</sup> and so is an illegal promise.<sup>8</sup> Absolute capacity to perform is not necessary, since, if it were, few promises would be good. What is requisite is such a chance of performance as the other contracting party may find it worth while to purchase.<sup>9</sup> As has already been seen, the concessions which form part of the reconstruction of an old agreement may form the consideration of a new contract.<sup>10</sup>

§ 524. A promise for which no consideration has been given

<sup>1</sup> See Lang. Sum. § 89.

<sup>2</sup> *Supra*, § 514; *Livingston v. Rogers*, 1 Caines, 585; *Keep v. Goodrich*, 12 Johns. 397. As to conditional promises, see *infra*, §§ 545 *et seq.*

<sup>3</sup> *Supra*, §§ 8 *et seq.*

<sup>4</sup> *Supra*, § 509.

<sup>5</sup> *Knapp, J., Crowell v. Osborne*, 43 N. J. L. 335.

<sup>6</sup> *Supra*, §§ 31–2; and see to the effect that mutuality is essential, *supra*, § 2.

<sup>7</sup> *Supra*, § 510.

<sup>8</sup> *Supra*, § 509.

<sup>9</sup> *Nerot v. Wallace*, 3 T. R. 17; *Haslam v. Sherwood*, 10 Bing. 540, are to be understood in the sense of the text.

<sup>10</sup> *Supra*, § 505; *infra*, § 858.

may be revoked before acceptance;<sup>1</sup> but this contingency does not prevent a promise to sell certain goods, if ordered, from being a good consideration for a contract between the party so promising and the party ordering the goods.<sup>2</sup> "The consideration for a promise may well be contingent, that is, it may consist in the doing something by the promisee which he need not do unless he chooses, but which being done by him the contract is complete and the promise binding."<sup>3</sup> Whether a continuing offer to supply to a particular party goods indefinitely for a particular period binds him unless the promisee agrees to depend on him exclusively, or there be an acceptance for specific goods, may be doubted.<sup>4</sup> A guaranty, however, dependent on the employment of a particular person, would be good.<sup>5</sup>—Contingent promises of this class may be retracted at any time until some act based on them is done by the other contracting party.<sup>6</sup>—Any surrender of a right on the other side, no matter how slight, even though amounting only to an understanding that there shall be a suspension of inquiries elsewhere, will be a consideration for a promise to keep open an offer.<sup>7</sup>

Promise though contingent may be a good consideration.

§ 525. A promise to support an illegitimate child in consideration of its surrender by its mother, and other forbearance on her part, will be sustained as made on sufficient consideration.<sup>8</sup> Hence it has been held that a bond for an annuity by the father to the mother of illegitimate children conditioned on her

Promise to support of illegitimate child good when on good consideration.

<sup>1</sup> *Supra*, § 10.

<sup>2</sup> See *supra*, § 16; *infra*, §§ 575 *et seq.*

<sup>3</sup> Pollock (Wald's ed.), 160, citing *Great N. R. R. v. Witham*, L. R. 9 C. P. 16. To the point in the text Mr. Wald, in a learned note to Pollock, cites *Cottage St. Ch. v. Kendall*, 121 Mass. 528; and see cases cited *supra*, § 16; *Turnpike Co. v. Coy*, 13 Oh. St. 84; and see *Babcock v. Wilson*, 17 Me. 372; *Appleton v. Chase*, 19 Me. 74.

<sup>4</sup> See *Great N. R. R. v. Witham*, *ut supra*; *Thayer v. Burchard*, 99 Mass. 508; *Bailey v. Austrian*, 19 Minn. 535, denying such liability *in toto*, and observations in Wald's Pollock, 160. As

to continuous offer see *supra*, §§ 9, 14; as to continuous considerations see *supra*, § 515.

<sup>5</sup> *Newbury v. Armstrong*, 6 Bing. 201; *Kennaway v. Treleavan*, 5 M. & W. 501.

<sup>6</sup> *Routledge v. Grant*, 4 Bing. 660.

<sup>7</sup> See *supra*, § 13.

<sup>8</sup> *Jennings v. Brown*, 9 M. & W. 496; *Ridley v. Ridley*, 11 Jurist, N. S. 475; *Hammersley v. De Biel*, 12 Cl. & F. 45; *Alderson v. Maddison*, L. R. 5 Ex. D. 293; *Holcome v. Stimpson*, 8 Vt. 141; *Howe v. Litchfield*, 3 Allen, 443; *Hook v. Pratt*, 78 N. Y. 376; *Sharp v. Teese*, 4 Halst. 352; *Wright v. Tinsley*, 30 Mo. 396.

not claiming their custody is good;<sup>1</sup> and so where a distinct provision is made on consideration of the mother not proceeding against the father for affiliation.<sup>2</sup> It is otherwise, however, when the consideration is past illicit intercourse.<sup>3</sup>

§ 526. At common law, while the assignment of a debt does not authorize the assignee to sue in his own name,<sup>4</sup> it conveys to him the control over the debt, and entitles him to use the assignee's name to sue it out.<sup>5</sup> By statute or by local usage suit may be now brought in most jurisdictions by the party beneficially interested.<sup>6</sup> This is the case with negotiable paper, and with negotiable securities such as railway bonds and other similar obligations.<sup>7</sup> It is sufficient, on this topic, to say that wher-

<sup>1</sup> Plaskett's Est. *in re*, 30 L. J. C. 606; cited Leake, 2d ed. 620.

<sup>2</sup> *Supra*, § 486; *infra*, § 532; Linne-gar v. Hodd, 5 C. B. 437; Follit v. Koetzow, 2 E. & E. 730; Smith v. Roche, 6 C. B. N. S. 223.

<sup>3</sup> *Supra*, §§ 373, 512. In Wallace v. Rappelye, Sup. Ct. Ill. 1881, it appeared that W., the father of an illegitimate child, agreed with the mother, that in consideration of her abandonment to him of all claim for damages, and releasing custody of the child, he would adopt the child as his own, and give her a portion of his estate. This agreement was carried out by both parties, except that no legal form of adoption was ever had, but the child was taken into the family of her father, and ever after treated as his daughter. It was held that the agreement was sufficient in equity to sustain the claim of such child to a portion of her father's estate.

"What was really intended and obviously understood by the parties," said Mulkey, J., "was that Wallace was to adopt such legal measures as would secure to the child the same interest in his estate as she would, on his dying intestate, succeed to, if a legitimate child. If, as is claimed, there

was no law at that time by which Wallace could confer upon her the capacity of inheriting his estate upon his intestacy, to give the contract any force at all, it must be construed as an undertaking on his part to secure to her by deed, will, or some other appropriate means, so much of his estate subject to distribution at the time of his death, as she would have been entitled to, if a legitimate child, upon his dying intestate; for it is manifest, to give it the construction contended for, would render it inoperative altogether. This we are not prepared to do."

That an agreement to pay a seduced woman support is without consideration, see *supra*, § 512.

<sup>4</sup> *Infra*, §§ 836 *et seq.*, 952; Metc. on Cont. 187; Bac. Ab. Assign. D.; Welch v. Mandeville, 1 Wheat. 233; 5 Wheat. 277; Riley v. Taber, 9 Gray, 373.

<sup>5</sup> *Infra*, §§ 836 *et seq.*; Legh v. Legh, 1 B. & P. 447; Dunn v. Snell, 15 Mass. 481.

<sup>6</sup> *Infra*, § 841; Metc. on Cont. 188; Innes v. Dunlop, 8 T. R. 595; Thompson v. Farden, 1 M. & G. 535.

<sup>7</sup> Vertue v. R. R., 5 Exch. 280; Thomson v. Lee Co., 3 Wall. 327; see *infra*, § 838.



ever a debt is assignable, its assignment is a good consideration.

§ 527. Where there are several creditors who agree to release the common debtor on part payment, the release by one creditor is a sufficient consideration for the release by another. "If you will release him, I will." Such a bargain is equitable; and supposing the transaction to be fair, and there be no concealment or reservation, each creditor signing the release, upon his reception of his share of the assets assigned, loses his right to fall back on the debtor except in accordance with the terms of the release.<sup>1</sup> But a promise by a particular creditor to accept a part of his debt in satisfaction, although on condition that no other creditor shall receive a larger percentage, is void for want of consideration.<sup>2</sup>

Releases by other creditors sufficient consideration to support a release.

§ 528. A voluntary subscription to a charity, or other object of general interest, when the consideration is the faithful discharge of duty by the party to whom the subscription is made, binds the party giving it, though without other consideration.<sup>3</sup> It is a sufficient consideration that the labor and responsibility of the trust is undertaken by the party to whom the subscription is made, though this condition is inferred from the whole transaction, and is not expressly made,<sup>4</sup> or by other subscribing

Mutual subscriptions to charities bind.

<sup>1</sup> *Infra*, § 1005; and see *supra*, §§ 210; *Caley v. R. R.*, 80 Penn. St. 363; *Petty v. Board*, 70 Ind. 290; *Underwood v. Waldron*, 12 Mich. 73; *Comstock v. Howd*, 15 Mich. 237; *Lathrop v. Knapp*, 27 Wis. 214; *Galt v. Swain*, 9 Grat. 633; see *Collier v. Baptist Soc.*, 8 B. Mon. 68; *Robertson v. March*, 3 Scam. 198; see *supra*, § 24, as to uncertain promisee. That such subscriptions must be accepted to bind, see *supra*, § 16 a.

<sup>2</sup> *Van Rensselaer v. Aiken*, 44 N. Y. 126; see *infra*, §§ 997 *et seq.*

<sup>3</sup> *Trustees v. Haskell*, 73 Me. 140; *State Treasurer v. Goss*, 9 Vt. 289; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Bryant v. Goodenow*, 5 Pick. 229; *Watkins v. Eames*, 9 Cush. 537; *Mirick v. French*, 2 Gray, 420; *Barnes v. Perine*, 9 Barb. 202; *Knoxboro Church v. Beach*, 74 N. Y. 72; *Phipps v. Jones*, 20 Penn. St. 260; *Gittings v. Mayhew*, 6 Md. 113; *Edinboro Acad. v. Robinson*, 37 Penn. St.

210; *Caley v. R. R.*, 80 Penn. St. 363; *Petty v. Board*, 70 Ind. 290; *Underwood v. Waldron*, 12 Mich. 73; *Comstock v. Howd*, 15 Mich. 237; *Lathrop v. Knapp*, 27 Wis. 214; *Galt v. Swain*, 9 Grat. 633; see *Collier v. Baptist Soc.*, 8 B. Mon. 68; *Robertson v. March*, 3 Scam. 198; see *supra*, § 24, as to uncertain promisee. That such subscriptions must be accepted to bind, see *supra*, § 16 a.

<sup>4</sup> *University of Vermont v. Buell*, 2 Vt. 48; *Troy Academy v. Nelson*, 24 Vt. 189; *Homes v. Dana*, 12 Mass. 190; *Warren v. Stearns*, 19 Pick. 73; *Mirick v. French*, 2 Gray, 420; *Ladies' Collegiate Institute v. French*, 16 Gray,

parties.<sup>1</sup> *A fortiori* is this the case when there is any outlay by trustee or fellow-subscriber on the faith of the subscription sued on.<sup>2</sup> "Where something has been done, or some liability or duty assumed, in reliance upon the subscription, in order to carry out the object, the promises are binding and may be enforced, although no pecuniary advantage is to result to the promisors."<sup>3</sup> But the endowment, actual and prospective, of a literary institution by others is not a sufficient consideration for a promise to give to such an institution unless payments or subscriptions by others are made on the faith of the promise;<sup>4</sup> or unless the promise is the consideration for certain exertions to be made by parties acting for the institution.<sup>5</sup>—Whether the fact that B. is induced to subscribe

196; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Barnes v. Perine*, 9 Barb. 202; *Caul v. Gibson*, 3 Barr, 416; *Graff v. Pitts. R. R.*, 31 Penn. St. 489; *Galt v. Swain*, 9 Grat. 633; *Commis. v. Perry*, 5 Ohio, 56; *McClure v. Wilson*, 43 Ill. 356; *Method. Ep. Church v. Garvey*, 53 Ill. 401; *Hall v. Virginia*, 91 Ill. 535; *Mouton v. Noble*, 1 La. An. 192; *Collier v. B. E. Society*, 8 B. Mon. 68; *Lathrop v. Knapp*, 27 Wis. 214; *Philomath College v. Hartless*, 6 Oreg. 158; see *Petty v. Board*, 70 Ind. 290.

<sup>1</sup> *Miller v. Ballard*, 46 Ill. 377.

<sup>2</sup> *Knoxboro Church v. Beech*, 74 N. Y. 72; *Robertson v. March*, 3 Scam. 198.

<sup>3</sup> *Underwood v. Waldron*, 12 Mich. 89, adopted as text in *Metc. on Cont.* 185; *Commissioners v. Perry*, 5 Ohio, 59; *Peirce v. Ruley*, 5 Ind. 69.

In *Helfenstein's Est.*, 77 Penn. St. 331, *Sharswood, J.*, said: "Had the decedent united with others as a subscriber to the fund for the increase of the library to the theological seminary, the note upon which the appellant made his claim might have been sustained under the case of *Caul v. Gibson*, 3 Barr, 416. Or if the note had been accepted by the trustees before

the death of the promisor, it would have stood on the footing of the principle applied in *Chambers v. Calhoun*, 6 Harris (18 Penn. St.), 13; for in such case, if the trustees assumed the duty imposed upon them by the terms or conditions of the note, it would have been a sufficient consideration to sustain the promise. But, when the decedent died, the trustees had not accepted the note, and his death was a countermand in law of the offer, for such it must be considered until accepted. In *Phipps v. Jones*, 8 Harris (20 Penn. St.), 260, where there was a subscription with others for the benefit of a proposed association to build a church, the court held that it was a mere proposal, revocable until the association was formed and the promise accepted, and that the death of the subscriber was such a revocation."

<sup>4</sup> *Hamilton College v. Stewart*, 2 Denio, 403; S. C., 1 Comst. 581.

<sup>5</sup> *Ibid.*, and cases cited *supra*. See *Pitt v. Gentle*, 49 Mo. 74.

In the *London Law Times* of May 21, 1881, is the following: "We see it stated that Earl Cowper, acting under the advice of the attorney-general, has submitted to pay the subscription of

by C. subscribing is a good consideration for B.'s subscription depends upon whether C. loses any right or suffers any detri-

£500, which he had promised towards the restoration of St. Albans Cathedral. It appears the Earl had promised this sum to the faculty committee in 1877. He had paid no portion of it until the committee had not only done the work, to which he did not object, but had also restored the original high roof, in regard to which a controversy had occurred, when he had taken an active part against the faculty committee. Lord Cowper then refused to pay any of his subscription on that ground, and so pleaded in his defence to the action. On the eve of trial this defence has been abandoned. It has always been a moot point whether, and under what conditions, subscriptions promised to a charitable work can be recovered. It seems that in some of the common law courts of the United States attempts to recover subscriptions have met with success. But in *Cottage Street Church v. Kendall* (121 Mass. 528), cited by Pollock on Contracts, 2d ed. 598, note, the earlier dicta, that 'it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant,' were overruled. Earl Cowper's case seems, however, to show that, in the opinion of the attorney-general, where the work has actually been done, the promised subscription can be legally demanded. This certainly appears to be just."

In *University v. Livingston*, Sup. Ct. of Iowa, 1881 (13 Rep. 584), the suit was to recover the amount of a subscription to the University of Des Moines in the following terms: "'For and in consideration of securing to the Baptist denomination of Iowa the property situate in Des Moines, and known as the University of Des Moines, we,

the undersigned, hereby bind ourselves, individually, to pay the sums set opposite our names, when, in the aggregate, \$10,000 is so secured: provided the said amount is pledged by August 1, 1870. Grinnell, March 20, 1869.' The defendant had judgment, and plaintiff appealed. The judgment was affirmed in the supreme court. 'The question,' said Day, J., 'involved in this case is whether the proof shows without conflict that the subscription sued upon was without consideration. In *Meth. E. Church v. Kendall*, 121 Mass. 528, which is comparatively a recent case, and which contains the latest utterance of the supreme court of Massachusetts upon the question of subscriptions, the following language is employed: 'The performance of gratuitous promises depends wholly upon the good-will which prompted them, and will not be enforced by the law. The general rule is that, in order to support an action, the promise must have been made upon a legal consideration moving from the promisee to the promisor. *Exchange Bank v. Rice*, 107 Mass. 37. To constitute such consideration there must be either a benefit to the maker of the promise, or a loss, trouble, or inconvenience to, or a charge or obligation resting upon, the party to whom the promise is made.' In this case, most of the Massachusetts cases cited by appellant's counsel are referred to, and it is declared that 'in every case in which this court has sustained an action upon a promise of this description the promisee's acceptance of the defendant's promise was shown either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act,

ment by his subscription. If he does—if his promise, by the law to which he is subject, binds him ;<sup>1</sup>—if he pays up, either in whole or in part, or gives a sealed instrument or negotiable paper on which his liability is fixed, then in such case B. is bound.<sup>2</sup> Supposing, however, that the subscription is merely tentative—supposing that from the whole state of facts involved it is to be gathered that until certain independent conditions are complete the money shall not be due—then there is no consideration until these conditions are complete.<sup>3</sup>

such as advancing or expending money, or erecting a building, in accordance with the terms of the contract, and upon the faith of the defendant's promise.' In this case the plaintiff did not enter into any undertaking on account of the subscription in suit. The college building had been purchased, and the debt in question had been contracted, before that time. The plaintiff did not even obligate itself to raise the sum of \$10,000. The case is, in principle, very like *Stewart v. Trustees*, 2 Den. 403; S. C., 1 N. Y. 581, in which it was held there could be no recovery. See *Limerick Academy v. Davis*, 11 Mass. 113. In most of the authorities cited by appellant it will be found that the promisee entered into some undertaking, assumed some liability, or made some promise upon the faith of the subscription sought to be enforced. Nothing of the kind was done in this case. In our opinion, the court did not err in directing a verdict for the defendant upon the proof admitted.' "

<sup>1</sup> See *supra*, § 523; *infra*, § 595.

<sup>2</sup> *Infra*, § 595; *Gilman v. Veazie*, 24 Me. 202; *George v. Harris*, 4 N. H. 533; Cong. Soc. in *Troy v. Perry*, 6 N. H. 164; *Fisher v. Ellis*, 3 Pick. 323; *Trustees v. Stetson*, 5 Pick. 506; *Amherst Acad. v. Cowles*, 6 Pick. 427; *Watkins v. Eames*, 9 Cush. 537; *Mirick v. French*, 2 Gray, 420; *Brigham v. Mead*, 10 Allen, 245; *Mann v. Cook*,

20 Conn. 178; *Garrett v. R. R.*, 78 Penn. St. 465; *Miller v. Ballard*, 46 Ill. 377; *Peirce v. Ruley*, 5 Ind. 69; *Comstock v. Howd*, 15 Mich. 237; *Smith v. Plank-Road Co.*, 30 Ala. 650. As to effect of seal, see *Ball v. Dunster-ville*, 4 T. R. 313; *Cook v. Goodman*, 2 Q. B. 580.

<sup>3</sup> *Infra*, §§ 545 *et seq.*; *Ives v. Sterling*, 6 Met. 310; *M'Auley v. Billenger*, 20 Johns. 89; *Ayers's App.*, 28 Penn. St. 179; *Commissioners v. Perry*, 5 Ohio, 58; *Stuart v. R. R.*, 32 Grat. 146; *supra*, § 16 *a*.

In *Ladies' Coll. Inst. v. French*, 16 Gray, 196, where the implied promise of the promisee to disburse in conformity with the terms of the subscription was held a sufficient consideration, Chapman, C. J., said: "Subscriptions of this character have been made the subject of litigation in many instances; and the earlier cases in our reports contain *dicta*, some of which have not been sustained by later decisions. But in the cases of *Amherst Acad. v. Cows*, 6 Pick. 427; *Williams College v. Danforth*, 12 Pick. 541; and *Thompson v. Page*, 1 Met. 565, their validity is established, and the ground of it is definitely stated. It is held that by accepting such a subscription, the promisee agrees on his part with the subscribers, that he will hold and appropriate the funds subscribed in conformity with the terms and objects of

In those states, also, in which it is held that a third party cannot sue B. and C. on a contract made between them for

the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are thus held to rest upon a well settled principle in respect to concurrent promises."

In *Carr v. Bartlett*, 72 Me. 121, it was said by Peters, J.: "The defendant, with others, signed an agreement of association containing the following clauses: 'We, the undersigned, residents of the town of Montville and vicinity, hereby agree to enter into association for the purpose of erecting and operating a cheese factory, . . . and we severally and individually bind ourselves, by these presents, on or before the first day of May, 1874, to pay our regularly appointed building committee the several sums set opposite our names for the purpose of building and furnishing said factory. . . . The above not to be binding unless the sum of \$2000 is subscribed.' This undertaking, while it remained inchoate and incomplete, was not binding upon the defendant. It was without consideration. It was not a sufficient consideration that others joined in the same promise, relying upon her promise. *Foxcroft Academy v. Favor*, 4 Me. 382; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528. The latter case is the subject of an instructive note, citing and discussing a mass of authorities, in *Am. Law Reg. Sept. No. 1877*. At this stage of the undertaking the defendant could have withdrawn from it, or she could continue a party until the same became a completed agreement and binding upon her. She took the latter course. The subscription became completed. Her associates paid

in their subscriptions, made purchases, and entered into contracts necessary for the consummation of the common enterprise. She is presumed to have assented to all that was done. Those facts furnished a sufficient consideration for the liability which by her subscription she assumed. The authorities are agreed upon this point, as the cases cited and those to be cited clearly show.

"It is denied that the plaintiffs are competent parties to sue for the subscription. They are the regularly appointed building committee of the subscribers. They are themselves subscribers. In their name, for the benefit of the associates, they contracted for the erection of the factory. Under the agreement they are the payees or promisees by description, in whose names the subscriptions are collectible for the benefit of all concerned. They are the association by representation. Therefore, the objection is avoided that sometimes is presented in this class of contracts, that the mutual promises of the subscribers do not afford a consideration for a contract with a third person, for a want of privity between the subscribers and such person. *Thompson v. Page*, 1 Met. 565; *Ives v. Sterling*, 6 ib. 310; *Fisher v. Ellis*, 3 Pick. 323; *Watkins v. Eames*, 9 Cush. 537; *Athol Music Hall v. Carey*, 116 Mass. 471; *Curry v. Rogers*, 21 N. H. 247. There can be no valid objection to a suit in the name of the plaintiffs for the benefit of themselves and associates. See *infra*, § 808.

"It is further objected that the property and business became absorbed into a corporation subsequently formed. But this was after the defendant's lia-

his benefit, the mere fact of the contract being binding between B. and C. (subscribers to the charitable corporation), does not enable the corporation subscribed to, to sue.<sup>1</sup> And a mere agreement by A., B., C., and D. to subscribe a sum opposite to their names to some public object, there being no promisee named in the paper, and no privity of contract between the subscribing parties, does not sustain a suit brought against any one of them on his subscription. It would be otherwise, as we have seen, if a promisee be named who is to make and does make certain efforts in consideration of the subscription. As between the subscribers, also, there would be mutual liability if they agree together to make up a specific sum, so that the withdrawal of one increased the amount to be paid by the others. But if neither of these conditions exists, and if there is no privity of contract between the parties subscribing, the subscriptions must be regarded as inchoate or tentative.<sup>2</sup> Nor can a subscription to an incorporated church be enforced by the corporation unless it appear that the subscription was for its specific uses, though the treasurer to whom the subscription is made may sue if it was made per-

hily became fixed. It seems that all the subscribers were incorporated into a company with a corporate name, without any change in the purposes of the association or adding any liabilities to those before assumed. It gave them little more than 'a local habitation and a name.' Whether the defendant became thereby legally a member of the incorporated body or not, it is not a reason why her subscription cannot be enforced by the committee to whom the payment by the agreement was to be made. No right can be taken from her. For any loss or injury caused by others she can commence an action or resort to a remedy in equity. *Thompson v. Page*, *supra*; *Fisher v. Ellis*, *supra*; *Mirick v. French*, 2 Gray, 420; *Machias Hotel Co. v. Coyle*, 35 Me. 405.

"The corporation voted to release the defendant from the payment of the subscription. The vote was without any consideration, and before the vote was acted upon, it was reconsidered and annulled. That affords no defence to the action."

<sup>1</sup> *Cottage St. Church v. Kendall*, 121 Mass. 528; see *infra*, §§ 784 *et seq.*; *supra*, §§ 506-7. That something to be done by the institution subscribed to is a consideration for the subscription, see *Simpson College v. Bryan*, 50 Iowa, 293; *supra*, § 505.

<sup>2</sup> See *George v. Harris*, 4 N. H. 533; *Curry v. Rogers*, 1 Post. 255; *Farmington Acad. v. Allen*, 14 Mass. 172; *Rensselaer Glass Factory v. Reid*, 5 Cow. 603; *Methodist Asso. v. Sharp*, 6 Mo. Ap. 150.

sonally to him in consideration of his services.<sup>1</sup>—Until some action is taken on the basis of a subscription to a benevolent or other enterprise, it may be revoked.<sup>2</sup> “The promise, in such case, stands as a mere offer, and may, by necessary implication, be revoked at any time before it is acted on. It is the expending of money, etc., or incurring of legal liability on the faith of a promise, which gives the right of action, and without which there is no right of action. Until action upon it, there is no mutuality, and, being only an offer, and susceptible of revocation at any time before being acted upon, it follows that the death (or insanity) of the promisor, before the offer is acted upon, is a revocation of the offer.”<sup>3</sup> It would be otherwise, as has been already stated, if other parties had made themselves legally liable on the faith of the subscription claimed to be revoked.

§ 529. As we have already seen, subscribers to business corporations will be relieved from liability on subscriptions obtained from them by fraud.<sup>4</sup> The same principle applies to subscriptions to charitable and religious enterprises.<sup>5</sup> Should it appear, for instance, that, when the subscription is conditioned on raising a specific sum, some of the subscriptions were to be regarded as merely honorary, or were fictitious, this relieves the parties making the other subscriptions.<sup>6</sup> Nor can the subscription be enforced if the object be materially changed.<sup>7</sup>

Fraud vitiates subscription.

§ 530. Provided there be nothing in the agreement which is against the policy of the law, an interchange of patronage is a valid consideration. Thus where A., a subscriber to a charity, agreed with B., another subscriber, that A. would vote at one meeting for a particular candidate for relief, if B. would at a subsequent meeting vote for another candidate, this agreement was held

Interchange of patronage sufficient.

<sup>1</sup> *Knoxboro Church v. Beech*, 74 N. Y. 72.

<sup>2</sup> See *supra*, § 10.

<sup>3</sup> *Pratt v. Trustees*, 93 Ill. 475; *aff. in Beach v. Church*, 96 Ill. 179.

<sup>4</sup> *Supra*, § 276.

<sup>5</sup> *Middlebury College v. Loomis*, 1 Vt. 189.

<sup>6</sup> *Middlebury College v. Loomis*, 1 Vt. 189; *New York Exchange Co. v. De Wolf*, 31 N. Y. 273.

<sup>7</sup> *Worcester Med. Inst. v. Bigelow*, 6 Gray, 498.

valid.<sup>1</sup> But such an agreement by electors to a public office would be void as against the policy of the law.<sup>2</sup>

§ 531. It is not necessary in order to make the transfer of a right a valid consideration, that it should be a legal right. It is sufficient if it be an equitable right.<sup>3</sup> Hence a release by a mortgagor of an equity of redemption is a valid consideration;<sup>4</sup> and so, in England, forbearance by the assignee of a debt, whose title is there merely equitable.<sup>5</sup>

§ 532. Forbearing to press either a legal or equitable claim is a sufficient consideration for a promise.<sup>6</sup> Guarantees of debts are constantly rested on considerations of this kind; and when no time of forbearance is specified, the contract will be construed to mean a forbearance for a reasonable time.<sup>7</sup> And forbearance to sell goods under a bill of sale, or to execute a writ of *fi. fa.* has been held a sufficient consideration for a promise by a third party to pay the debt;<sup>8</sup> and so of forbearance to press an action for a tort, though it may be that the plaintiff in such action sustained no actual loss;<sup>9</sup> and so of forbearance in issuing execution;<sup>10</sup> and of withdrawing ob-

<sup>1</sup> *Bolton v. Madden*, L. R. 9 Q. B. 55.

<sup>2</sup> *Supra*, §§ 407 *et seq.*

<sup>3</sup> *Leake*, 2d ed. 624; *Wells v. Wells*, 1 Vent. 40; *Gully v. Bishop of Exeter*, 10 B. & C. 606; *Carpenter v. Dodge*, 20 Vt. 595; *Pearson v. Pearson*, 7 Johns. 26; *Whitbeck v. Whitbeck*, 9 Cow. 266; *Ewing v. Ewing*, 2 Leigh, 337.

<sup>4</sup> *Thorpe v. Thorpe*, 1 L. Raym. 663.

<sup>5</sup> *Morton v. Burn*, 7 A. & E. 19. See *infra*, § 532.

<sup>6</sup> *Leake*, 2d ed. 622; *Thornton v. Fairlie*, 2 Moore, 397; *Willatts v. Kennedy*, 8 Bing. 5; *Union Bk. v. Geary*, 5 Pet. 99; *Lonsdale v. Brown*, 4 Wash. C. C. 148; *King v. Upton*, 4 Me. 387; *Chapin v. Lapham*, 20 Pick. 467; *Barlow v. Ins. Co.*, 4 Met. 270; *Abbott v. Fisher*, 124 Mass. 414; *Stewart v. McGuin*, 1 Cow. 99; *Ward v. Fryer*, 19 Wend. 494; *Russell v. Cook*, 3 Hill, 504;

*Perkins v. Gray*, 3 S. & R. 327; *Giles v. Ackles*, 9 Barr, 147; *Cook v. Duvall*, 9 Gill, 460; *Durham v. Wadlington*, 2 Strob. Eq. 258; *Hartford Ins. Co. v. Olcott*, 97 Ill. 439; see *Mechanics' Bk. v. Wixson*, 42 N. Y. 438.

<sup>7</sup> *Oldershaw v. King*, 2 H. & N. 517; *Coles v. Pack*, L. R. 5 C. P. 65; *Robinson v. Gould*, 11 Cush. 55; *Sage v. Wilcox*, 6 Conn. 81; *Watson v. Randall*, 20 Wend. 201; *Hamaker v. Eberley*, 2 Binn. 506; *Muirhead v. Kirkpatrick*, 21 Penn. St. 237; *Colgin v. Henley*, 6 Leigh, 85; see *Cary v. White*, 52 N. Y. 138.

<sup>8</sup> *Barrell v. Trussell*, 4 Taunt. 117; *Pullin v. Stokes*, 2 H. Bl. 312; see *Hockenbury v. Meyers*, 5 Vroom, 346.

<sup>9</sup> *Davis v. Morgan*, 4 B. & C. 8.

<sup>10</sup> *Lent v. Padelford*, 10 Mass. 230.



jections to the probate of a will,<sup>1</sup> and of adjourning a suit in a justice's court.<sup>2</sup> The accepting by a creditor of a promissory note for an existing debt is evidence of a forbearance to sue until the maturity of the note; and this forbearance is a sufficient consideration for the note.<sup>3</sup> Nor does the fact that the party promising to pay is an executor, and that the consideration is the debt of his testator, relieve the executor from personal liability when he personally promises to pay in consideration of forbearance to the estate.<sup>4</sup> An agreement, also, by a petitioner to withdraw his application for winding up a company, is a sufficient consideration for a promise to pay the debt of the party so withdrawing, although there is nothing in the agreement to preclude him from presenting another petition to the same effect.<sup>5</sup> And an agreement by a tax collector to forbear distraining will be a consideration for a promise by the owner to pay the tax.<sup>6</sup>—Agreements to forbear criminal prosecutions, as we have seen, when amounting to compounding indictable offences, are, on independent grounds, illegal.<sup>7</sup> But there is no reason why such agreements to forbear should not be valid, and hence should form a sufficient consideration for a promise, in cases where the prosecution is only *quasi* criminal, and is virtually for the collection of a debt.<sup>8</sup> Hence forbearance in an affiliation procedure is a valid consideration for a promise by the alleged father to support the child.<sup>9</sup>—A forbearance, however, to be a consideration must be for a reasonable time; as otherwise, if the forbearance be not appreciable, there is no consideration.<sup>10</sup>—But an agreement to forbear

<sup>1</sup> *Hill v. Buckminster*, 5 Pick. 393.

<sup>2</sup> *Stewart v. McGuin*, 1 Cow. 99; *Richardson v. Brown*, 1 Cow. 255.

<sup>3</sup> *Baker v. Walker*, 14 M. & W. 465; *Jennison v. Stafford*, 1 Cush. 168; see *Calkins v. Chandler*, 36 Mich. 320; *Martin v. Black*, 20 Ala. 309. As to the conflict of opinion whether receiving negotiable paper is a satisfaction, see §§ 953 *et seq.*

<sup>4</sup> *Leake*, 2d ed. 623; citing *Fisher v. Richardson*, Cro. Jac. 47; *Rann v. Hughes*, 7 T. R. 350 n.

<sup>5</sup> *Harris v. Venables*, L. R. 7 Ex. 235.

<sup>6</sup> *Burrs v. Wilcox*, 13 Allen, 269; see *Baileyville v. Lowell*, 20 Me. 178.

<sup>7</sup> See *supra*, § 483.

<sup>8</sup> *Supra*, § 486.

<sup>9</sup> *Linnegar v. Hodd*, 5 C. B. 437; *Follit v. Koetzow*, 2 E. & E. 730; see *supra*, § 525, for other cases.

<sup>10</sup> *Mecorney v. Stanley*, 8 Cush. 85; *Boyd v. Freize*, 5 Gray, 553; *Shupe v. Galbreath*, 32 Penn. St. 10; and cases cited *Wald's Pollock*, 166; see as sustaining the position that a vague state-

immediate pressure will, under the circumstances of the case be construed to mean forbearance for a reasonable time;<sup>1</sup> and so when the length of time is left open.<sup>2</sup> And there must be some definite party to have been sued.<sup>3</sup> When the promise is to forbear to sue generally, this will be construed, if the context require no other inference, to mean a promise to forbear permanently.<sup>4</sup>—Mere forbearance, however, without an agreement, being an executed act, is not a sufficient consideration.<sup>5</sup>—The fact that the suit is not well founded makes no difference, if it has a show of title;<sup>6</sup> though it is otherwise in cases of fraud,<sup>7</sup> and in cases where the claim to be forborne is utterly destitute of support.<sup>8</sup>

ment of indulgence is a consideration, *Alliance Bk. v. Broom*, 2 Dr. & Sm. 289; *contra*, see *Nelson v. Serle*, 4 M. & W. 795; *Bixler v. Ream*, 3 Barr, 282.

<sup>1</sup> *Pollock*, 166; *Oldershaw v. King*, 2 H. & N. 517; *Hakes v. Hotchkiss*, 23 Vt. 235; *Lonsdale v. Brown*, 4 Wash. C. C. 148; see *Hamaker v. Eberley*, 2 Binn. 506; *Clark v. Russell*, 3 Watts, 213. That the time must be definite see, further, *Crofts v. Beale*, 11 C. B. 172.

<sup>2</sup> *Elting v. Vanderlyn*, 4 Johns. 237; *Hamaker v. Eberley*, 2 Binn. 506; *Clark v. Russell*, 3 Watts, 213;

<sup>3</sup> *Nelson v. Serle*, 4 M. & W. 795; see *Jones v. Ashburnham*, 4 East, 455.

<sup>4</sup> *Herring v. Dorell*, 8 Dow. P. C. 604; *Elting v. Vanderlyn*, 4 Johns. 437; *Clark v. Russell*, 3 Watts, 213. As to covenant not to sue, see *infra*, § 1036.

<sup>5</sup> *Manter v. Churchill*, 127 Mass. 31; *supra*, § 514.

<sup>6</sup> *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449; *infra*, § 533.

<sup>7</sup> *Supra*, § 232.

<sup>8</sup> *Smith v. Algar*, 1 B. & Ad. 604; *Nelson v. Serle*, 4 M. & W. 795; *Kidder v. Blake*, 45 N. H. 530; *Pitkin v. Noyes*, 48 N. H. 304; *Freeman v. Boynton*, 7 Mass. 483; *Martin v. Black*, 20 Ala. 309. The ruling in *Callisher*

*v. Bischoffsheim*, *supra*, is stated by Mr. Langdell to be that forbearance "is a sufficient consideration if the promisee 'bona fide' believed he had a fair chance of success," so that he might have sued without bad faith; and that, as there is a legal presumption in favor of honesty and good faith, the plaintiff need only allege in his declaration that he made the claim and threatened to sue, and that the defendant, if he wished to show that the forbearance constituted no consideration, must plead and prove that the plaintiff knew that he had no cause of action;" and this Mr. Langdell holds to be "alike repugnant to authority and principle," and he maintains it is inconsistent with *Cook v. Wright*, 1 B. & S. 559, on which it is professedly based. *Lang. Cont. ii. 1018*. It may be that *Callisher v. Bischoffsheim* went too far in throwing on the defendant the burden of proving that the plaintiff knew that he had no cause of action. But it does not go too far in holding that probable cause is sufficient to support a compromise. There is no litigated suit in which success is absolutely certain; and if there is a show of a case *bona fide* brought, its abandonment is a good consideration for a promise. Of course, these remarks do not apply

§ 533. As has been incidentally noticed, a promise to compromise a claim utterly unfounded will not be regarded as a valid consideration, (1) because such a claim is obviously and transparently valueless; (2) because to sanction such promises would be to sanction blackmailing; and (3) because the selling of unfounded claims, which such a transaction would virtually amount to, would be illegal as a species of champerty.<sup>1</sup> It is otherwise when a suit is brought *bona fide* on probable cause; and a promise to compromise such suit is a valid consideration, even though the suit should be held to be unfounded. Were it otherwise there could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case.<sup>2</sup> Not only will such agreements, when there is no fraud, be sustained by the courts, but they are highly favored, as productive of peace and good-will in the community, and reducing the expense and persistency of litigation.<sup>3</sup> The rule is peculiarly applicable in family settlements, where right and wrong on both sides are so

So of compromise of doubtful claim.

where an unreasonable bargain has been extorted, *supra*, § 165, or where there has been a distortion or suppression of facts, *supra*, §§ 232-252.

<sup>1</sup> See *supra*, §§ 411 *et seq.*; *infra*, §§ 836 *et seq.*

<sup>2</sup> *Supra*, § 198; *infra*, § 1000; Leake, 2d ed. 627; Longridge v. Dorville, 5 B. & Ald. 117; Atlee v. Backhouse, 3 M. & W. 633; Lucy *ex parte*, 4 De G. M. & G. 356; Thomas v. Brown, L. R. 1 Q. B. D. 714; Home Ins. Co. v. Baltimore, 93 U. S. 527; Blake v. Peck, 11 Vt. 483; Hodges v. Saunders, 17 Pick. 470; Clark v. Gamwell, 125 Mass. 428; Crans v. Hunter, 28 N. Y. 389; Wehrum v. Kuhn, 61 N. Y. 623; Wrege v. Westcott, 30 N. J. L. 212; Hoge v. Hoge, 1 Watts, 216; Tryon v. Miller, 1 Whart. 11; Fleming v. Ramsey, 46 Penn. St. 252; Zane v. Zane, 6 Munf. 406; Grasselli v. Lowden, 11 Oh. St. 349; Hindert v. Schneider, 4 Ill. Ap. 203; Paulin v. Howser, 63 Ill. 312;

Stearns v. Johnson, 17 Minn. 142; Van Dyke v. Davis, 2 Mich. 145; Truett v. Chaplin, 4 Hawks, 178; Taylor v. Patrick, 1 Bibb, 168; McKinley v. Watkins, 13 Ill. 140; Livingston v. Dugan, 20 Mo. 102; Riley v. Kershaw, 52 Mo. 224; Snow v. Grace, 29 Ark. 131.

<sup>3</sup> 2 Ch. on Con. 11th Am. ed. 46; Cook v. Wright, 1 B. & S. 559; Longridge v. Dorville, 5 B. & Ald. 117; Edwards v. Baugh, 11 M. & W. 641; Stewart v. Stewart, 6 Cl. & F. 911; Read v. Hitchings, 71 Me. 590; Pitkin v. Noyes, 48 N. H. 304; Blake v. Peck, 11 Vt. 483; Leach v. Fobes, 11 Gray, 509; Powers v. Freeman, 2 Lans. 127; Brown v. Sloane, 6 Watts, 421; Barton v. Wells, 5 Whart. 225; Logan v. Matthews, 6 Barr, 417; Fisher v. May, 2 Bibb, 448; Truett v. Chaplin, 4 Hawks, 178; Williams v. Alexander, 4 Ired. Eq. 207; Field v. Weir, 28 Miss. 56; Warren v. Williamson, 8 Baxt. 427. See *supra*, § 198; *infra*, § 1000.

often dependent on feeling;<sup>1</sup> in which cases the courts, unless there be imposition, will not undertake to weigh actual gain or loss.<sup>2</sup> On the same principle, the courts will sustain a settlement of a large unliquidated claim on a cash payment much smaller in amount.<sup>3</sup>—It is not necessary, as we have seen, that there should be a specific new consideration to alter an old contract.<sup>4</sup>—Whether or no suit has been instituted makes no difference;<sup>5</sup> but there must be some probable cause, so as to make out a case of doubt, to make such an agreement binding.<sup>6</sup> If an executor, for instance, should say to a legatee, whose claim is unquestionable, “I dispute your claim,” and thus get from the legatee a promise to take a less amount than that designated by the will, the legatee would not be bound by the promise.<sup>7</sup>—But the fact that a suit must have failed from want of technical proof does not make such a compromise void for want of consideration;<sup>8</sup> nor is it necessary that the question in dispute should be one as to which, looking back on it from our present stand-point, we should say, “this was really a question of much doubt.” It is enough if it was one as to which doubt at the time could honestly be felt.<sup>9</sup>

<sup>1</sup> *Groves v. Perkins*, 6 Sim. 576; *Langstaffe v. Fenwick*, 10 Ves. 405; *Bierers's App.*, 92 Penn. St. 265; *Smith v. Smith*, 36 Ga. 184. As to limitations on this position, see *supra*, §§ 394 *et seq.*

<sup>2</sup> *Stewart v. Stewart*, 6 Cl. & F. 969; *Shotwell v. Murray*, 1 John. Ch. 516.

<sup>3</sup> *Infra*, §§ 937, 1000; *supra*, § 521; *Atlee v. Backhouse*, 3 M. & W. 651; *Wilkinson v. Byers*, 1 Ad. & El. 106; *Tuttle v. Tuttle*, 12 Met. 551; *Howard v. Norton*, 85 Barb. 161; *Palmerton v. Huxford*, 4 Denio, 166; *Cutter v. Cochran*, 116 Mass. 408; *Rollins v. Marsh*, 128 Mass. 116.

<sup>4</sup> *Brown v. Everhard*, 52 Wis. 205; *supra*, §§ 505, 521; *infra*, § 858.

<sup>5</sup> *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 451; *Wilby v. Elgee*, L. R. 10 C. P. 497; *Cook v. Wright*, 1 B. & S. 559;

*Longridge v. Dorville*, 5 B. & Ald. 117; *Hamaker v. Eberley*, 2 Binn. 506; *Bennet v. Paine*, 5 Watts, 259; *Muirhead v. Kirkpatrick*, 21 Penn. St. 237.

<sup>6</sup> *Supra*, § 532; *Edwards v. Baugh*, 11 M. & W. 641.

<sup>7</sup> *Infra*, § 535; *Thomson v. Eastwood*, L. R. 2 App. Ca. 215. See *Moore v. Fitzwater*, 2 Rand. (Va.) 442; *Foster v. Metts*, 55 Miss. 77.

<sup>8</sup> *Thomas v. Brown*, L. R. 1 Q. B. D. 714.

<sup>9</sup> *Cook v. Wright*, 1 B. & S. 559; *Kerr v. Lucas*, 1 Allen, 279; *Russell v. Cook*, 3 Hill, 504; *Hoge v. Hoge*, 1 Watts, 216; *Durham v. Wadlington*, 2 Str. Eq. 258; *Allen v. Prater*, 35 Ala. 169. In *Little v. Allen*, Sup. Ct. Tex. 1882 (13 Rep. 413), we have the following from Stayton, J.: “A mutual agreement for compromise is, in itself,

§ 534. It may be that a document which A. surrenders to B. may be worthless; but if there be no fraud, the mere fact that it would sustain *prima facie* a suit by which A. could be benefited makes the surrender a sufficient consideration to support a promise from B. to A. This has been held to apply to the surrender of an invalid will;<sup>1</sup> and to the surrender of an invalid guaranty.<sup>2</sup>

So of giving up of litigated document.

§ 535. While forbearance of a claim that has a *prima facie* case is a valid consideration, even though the claim prove to be without sound foundation, it is otherwise with an utterly void claim.<sup>3</sup> This has been held to be the case with regard to a release by a party of all interest in an estate in which he has not even a show of an interest;<sup>4</sup> with regard to a promise to conduct bankrupt proceedings so as to inconvenience the promisee as little as possible;<sup>5</sup> with regard to the surrender of a tenancy at will, because a tenancy at will is not an estate of appreciable value;<sup>6</sup> and with regard to surrendering claims in which there is obviously

Forbearance of void claims no consideration.

a valuable consideration. In *Cavode v. M'Kelvey*, Addison, 56, it was held that where one claimant purchased the title of another claimant, the contract was upon valuable consideration, though the title bought was bad. In *O'Keson v. Barclay*, 2 P. & W. 531, which was an action for libel, it was held that a compromise of the action was a valuable consideration sufficient to sustain an agreement, although the words alleged to be libellous were not actionable.—No investigation into the character or value of respective claims will be made, it being sufficient that the parties thought there was a question between them. 1 Parsons on Contr. 439. In *Hoge v. Hoge*, 1 Watts, 216, it was held that the compromise of a doubtful title was a valuable consideration, and sufficient, although a party thereto may have been ignorant of his rights, unless the compromise be vitiated by fraud sufficient to set aside any

other contract." In *Flannagan v. Kilcome*, 58 N. H., it was held that it did not affect the principle stated in the text that it was shown that the abandoned suit ought to have prevailed; citing *Pitkin v. Noyes*, 48 N. H. 294, 304; *Peirce v. Building Co.*, 9 La. 397, and other cases.

<sup>1</sup> *Smith v. Smith*, 13 C. B. N. S. 429.

<sup>2</sup> *Haigh v. Brooks*, 10 A. & E. 309.

<sup>3</sup> *Leake*, 2d ed. 625; *Cowper v. Green*, 7 M. & W. 633; *N. H. Bank v. Colcord*, 15 N. H. 119; *Palfrey v. R. R.*, 4 Allen, 55; *Knotts v. Preble*, 50 Ill. 226; *Hennessey v. Hill*, 52 Ill. 281; *Mulholland v. Bartlett*, 74 Ill. 58; *Lowe v. Weatherley*, 4 Dev. & B. 212; *Prater v. Miller*, 25 Ala. 320; *Barkley v. Hanlan*, 55 Miss. 606.

<sup>4</sup> *Kaye v. Dutton*, 7 M. & G. 807.

<sup>5</sup> *Bracewell v. Williams*, L. R. 2 C. P. 196.

<sup>6</sup> *Leake*, *ut supra*, citing *Richardson v. Mellish*, 2 Bing. 244.

no cause of action.<sup>1</sup> Hence it has been held in England that promise of forbearance by the assignee of a bond upon which, by reason of equities subsisting between the obligor and the assignor, the assignor had no right to sue, is not a sufficient consideration to support a promise by the obligor, in ignorance of his rights, to pay the bond.<sup>2</sup> And, *a fortiori*, an agreement to take money for abandoning a claim which the party holding knows is unfounded is void as fraudulent and extortionate.<sup>3</sup> But the mere fact that a claim has not a strong case to rest on does not preclude it from being the basis of a binding settlement; and this is peculiarly the case with compromises of family disputes.<sup>4</sup>

§ 536. The assumption by A. of an indebtedness on condition of B. doing a particular thing, is a consideration to support B.'s promise to do that thing.<sup>5</sup> Hence a promise by A. to buy certain property in consideration of B. undertaking to supply the money binds A., such promise by B. being a sufficient consideration.<sup>6</sup> And a promise by the residents of a town that they will pay a tax levied on the town in consideration of allowance of discount is binding.<sup>7</sup> And a party may make himself liable as guarantor without any consideration

Assuming collateral indebtedness a valid consideration.

<sup>1</sup> Jones v. Ashburnham, 4 East, 455; Barber v. Fox, 2 Wms. Saund. 136; New Hampshire Bk. v. Colcord, 15 N. H. 119. In Cline v. Templeton, 78 Ky. 550, Hines, J., said: "That there is no cause of action either at common law or under the statutes, in behalf of a woman for seduction, is clearly established. (Woodward v. Anderson, 9 Bush, 624.) It is laid down, both in Parsons on Contracts and in Chitty on Contracts, that an agreement to forbear to prosecute a claim which is wholly and certainly unsustainable at law or in equity is no consideration for a promise. (Parsons, vol. i. p. 440; Chitty, vol. i. pp. 35 to 46.) This proposition appears to be so well established that further citation of authorities seems to us unnecessary. We need

not discuss the question as to whether past cohabitation is a good consideration for a promise, since it is admitted that the sole consideration was the agreement to forbear suit."

<sup>2</sup> Graham v. Johnson, L. R. 8 Eq. 36.

<sup>3</sup> Callisher v. Bischoffsheim, L. R. 5 Q. B. 489; see Pitkin v. Noyes, 48 N. H. 294; Knotts v. Preble, 50 Ill. 226. For criticisms on Callisher v. Bischoffsheim, see *supra*, § 532.

<sup>4</sup> *Supra*, § 533.

<sup>5</sup> Stadt v. Lill, 9 East, 348; Homes v. Dana, 12 Mass. 190; Leonard v. Vredenburgh, 8 Johns. 29; Cook v. Bradley, 7 Conn. 57; *supra*, §§ 506-7.

<sup>6</sup> Skidmore v. Bradford, L. R. 8 Eq. 134; see Bryant v. Goodnow, 5 Pick. 228.

<sup>7</sup> Baileyville v. Lowell, 20 Me. 178.

passing between principal and guarantor. "It is enough, if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guarantee to the principal debtor."<sup>1</sup> But unless a guarantee is contemporaneous with and an incident of a debt, it requires an independent consideration in the way of an indulgence from the creditor, to make it valid.<sup>2</sup>

§ 537. Marriage is a valuable consideration as between the parties;<sup>3</sup> and hence a settlement by a man on his wife, or by the wife on her husband, in consideration of marriage is as valid and binding, even against subsequent *bona fide* purchasers for value, as would be a sale of the same property for a full price.<sup>4</sup>—A promise by a third party to either the intended husband or the intended wife, it has been held, will be sustained by the consideration of the projected marriage.<sup>5</sup>—Marriage, however, ceases to be

Marriage is a valuable consideration.

<sup>1</sup> Best, C. J., *Morley v. Boothby*, 3 Bing. 113.

<sup>2</sup> *D'Wolf v. Rabaud*, 1 Pet. 476; *Packard v. Richardson*, 17 Mass. 129; *Mecorney v. Stanley*, 8 Cush. 85; *Leonard v. Vredenburg*, 8 Johns. 29. As to guarantee, see *supra*, § 515; *infra*, § 570.

<sup>3</sup> *Whelan v. Whelan*, 3 Cow. 537; *Wright v. Wright*, 54 N. Y. 437; *Whitehill v. Lonsey*, 2 Yeates, 109; *Frank's App.*, 59 Penn. St. 190; *Derry v. Derry*, 74 Ind. 560; *Huston v. Cantrel*, 11 Leigh, 136.

<sup>4</sup> *Supra*, § 377; *Richardson v. Horton*, 7 Beav. 112; *Clarke v. Wright*, 6 H. & N. 849; *Price v. Jenkins*, L. R. 5 C. D. 619; *Kevan v. Crawford*, L. R. 6 C. D. 29; *Gale v. Gale*, L. R. 6 C. D. 144; *Tomlinson v. Matthews*, 98 Ill. 178; *Latimer v. Glenn*, 2 Bush, 535; *Miller v. Edwards*, 17 Bush, 397; *Wall v. Scales*, 1 Dev. Eq. 476; *Ploss v. Thomas*, 6 Mo. Ap. 157; *Magniac v. Thompson*, 7 Pet. 348. In *Magniac v. Thompson*, it was said by the court:

"Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settlor alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it."

<sup>5</sup> *Shadwell v. Shadwell*, 9 C. B. N. S. 159; see *supra*, § 497. In *Stratton v. Stratton*, 58 N. H. 473, there was an ante-nuptial agreement that if the wife would take a farm, on which she held a mortgage, and the husband would carry it on, she would contribute the products to the support of the family and herself after marriage. Marriage took place, and the husband made valuable improvements at his own expense. After two years the wife conveyed the farm to another in violation of his rights. The court said: "The disabilities and extensive suspension

a good consideration in cases where the husband is largely insolvent at the marriage, and the wife knows that the conveyance to her is to defraud his creditors.<sup>1</sup> But such a settlement will not be set aside on ground of fraud unless on clear proof of the wife's complicity.<sup>2</sup>—A marriage settlement in fraud of marital rights will be set aside.<sup>3</sup>

§ 538. When a gift though gratuitous has been fairly made, after full deliberation, a court of equity will not interfere to revoke it, unless it was intended by the donor to be revocable;<sup>4</sup> and a declaration of trust, although without consideration, will, when made fairly and deliberately, and when vesting a specific interest in the *cestui que trust*, be sustained.<sup>5</sup>

§ 539. Promissory notes and bills of exchange are presumed to have been made for value, and, as we have seen, this presumption is irrebuttable so far as concerns *bona fide* endorsees for value without notice. As between the parties, however, and against endorsees

of legal personality, imposed upon married women by the ancient common law, are so far removed by statute, and by change of customs and conditions of society from which common law is largely derived, as to present no obstacle to the maintenance of this action by the plaintiff against his wife. *Clough v. Russell*, 55 N. H. 279. Her agreement was valid as a contract for a marriage settlement in his favor; and her conveyance to Ladd was a fraud upon that settlement. Under the former law, the husband, acquiring by marriage great and immediate rights in his wife's property, was entitled to relief against her fraudulent ante-nuptial conveyance of property which she had represented herself to him to be possessed of. 1 Story Eq. § 273. And for the purpose of this case, the legal capacities of the plaintiff and his wife being equal, her ante-nuptial promise, in consideration of marriage, is as binding as his, and equally enforce-

able by process of law. Specific performance of her agreement for the use of her land may be enforced to prevent a fraud being practised upon him by his wife's inducing him to expend his money in valuable improvements on the faith of her agreement, and then depriving him of the benefit of them, and securing them or the proceeds of them for herself."

<sup>1</sup> *Supra*, §§ 377 *et seq.*; *Wilson v. Prewett*, 3 Wood's C. C. 631; *Wilson v. Jordan*, 3 Wood's C. C. 647. As to family settlements, see *supra*, § 377.

<sup>2</sup> *Prewitt v. Wilson*, 103 U. S. 22.

<sup>3</sup> *Supra*, § 399.

<sup>4</sup> *Toker v. Toker*, 31 Beav. 629; *Coutts v. Acworth*, L. R. 8 Eq. 558; that an executed gift cannot be recalled, see *supra*, § 496.

<sup>5</sup> Leake, 2d ed. 610; *Kekewich v. Manning*, 1 D. M. & G. 176; *Richardson v. Richardson*, L. R. 3 Eq. 686; *supra*, § 496.



with notice or after maturity, the want of consideration may be shown, though the burden is on the party attempting to show such want of consideration.<sup>1</sup> But if the paper is shown to have been stolen or lost or fraudulently obtained, then the burden of proving consideration is on the holder seeking to avail himself of the bill.<sup>2</sup>

§ 540. It is not necessary that a consideration, if there be one, should appear on the face of a document. A deed, for instance, may purport to convey land for the price of a dollar an acre; but this will not prevent the parties, or either of them, from showing that the price paid was one thousand dollars.<sup>3</sup> Nor is the averment of a consideration of natural love and affection binding on the parties. It may be disputed by showing on the one side an additional valuable consideration, or on the other side that the whole transaction was a fraud.<sup>4</sup> A party is not estopped from proving such variation.<sup>5</sup> But, even in equity, a party claiming under a sealed document is bound by the general character of the consideration stated, unless mistake on both sides be shown, or the omission be satisfactorily explained. He cannot, for instance, as part of his case (unless with the above qualification), if money be averred, prove

Consideration may be proved or varied by parol.

<sup>1</sup> *Supra*, §§ 493 *et seq.*; *Holliday v. nett*, 26 Me. 397; *Arms v. Ashley*, 4 Atkinson, 5 B. & C. 501; *Mills v. Pick*, 71; *Hannan v. Hannan*, 123 Barber, 1 M. & W. 425; *Aldrich v. Mass.* 441; *Farnsworth v. Boardman*, 131 Mass. 115; *Tingley v. Cutler*, 7 Warren, 16 Me. 465; *Thurston v. McKown*, 6 Mass. 428; *Wheeler v. Guild*, 20 Pick. 545; *Case v. Banking Ass.*, 4 Conn. 291; *Hebbard v. Haughian*, 70 N. Y. 57; *Cunningham v. Dwyer*, 23 Comst. 166; *Barnet v. Offerman*, 7 Md. 219; *Jones v. Sasser*, 1 Dev. & B. Watts, 130; *Swain v. Ettling*, 32 Penn. St. 486.

<sup>2</sup> *Leake*, 2d ed. 608; *Mills v. Barber*, 1 M. & W. 425; *Bailey v. Bidwell*, 13 M. & W. 73; *Mather v. Maidstone*, 1 C. B. N. S. 273; *Jones v. Gordon*, L. R. 2 Ap. Ca. 628; *Lenheim v. Wil- marding*, 55 Penn. St. 73.

<sup>3</sup> *Wh. on Ev.* §§ 1042, 1044-1050; *Townsend v. Toker*, L. R. 1 Ch. Ap. 459; *Llanelly R. R. v. London R. R.*, L. R. 8 Ch. 955; *Cummings v. Den-*

<sup>4</sup> *Filmer v. Gott*, 4 Br. P. C. 230; *Gale v. Williamson*, 8 M. & W. 405; *Kelson v. Kelson*, 10 Hare, 385; *Gow- ard v. Waters*, 98 Mass. 596; *Brown v. Lunt*, 37 Me. 423; *Lewis v. Brewster*, 57 Penn. St. 410; and other cases cited in *Wh. on Ev.* § 1046.

<sup>5</sup> *Maigley v. Hauer*, 7 Johns. 341; *Leonard v. Vredenburg*, 8 Johns. 29; *Buckley's App.*, 48 Penn. St. 491; *Hendrick v. Crowley*, 31 Cal. 471.

natural love and affection, or, if natural love and affection be averred, prove money.<sup>1</sup> But no matter what may be the consideration averred, a party attacking the conveyance for fraud may impeach the averment by parol.<sup>2</sup>

<sup>1</sup> *Peacock v. Monk*, 1 Ves. Sen. 128; *Morris Canal Co. v. Ryerson*, 27 N. J. Gale v. Williamson, 8 M. & W. 408; L. 457.

*Morse v. Shattuck*, 4 N. H. 229; *Holbrook v. Holbrook*, 30 Vt. 432; *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Winchell v. Latham*, 6 Cow. 682; <sup>2</sup> Wh. on Ev. §§ 923-8, 1047; *Estabrook v. Smith*, 6 Gray, 572; *Bowen v. Bell*, 20 Johns. 338; *Hoever v. Mugele*, 66 Penn. St. 348; *Johnson v. Taylor*, 4 Dev. L. 355.

## CHAPTER XVII.

## CONDITIONS.

## I. DEFINITION AND ANALYSIS.

A condition is a limitation on an uncertainty, § 545.

Limitation must be as to uncertainty, § 546.

Contract conditioned on impossibility is void, § 547.

While condition is still undetermined, promise is operative though suspended, § 548.

Promises to pay in future may be conditional, § 549.

In Roman law promises are suspensive or resolute, § 550.

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Conditions precedent may be divisible, § 552.

## II. CONSTRUCTION.

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Whether a stipulation is a condition depends on intention, § 554.

Whole contract to be considered, § 555.

Extrinsic facts admissible to explain, § 556.

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When acts are reciprocally dependent, party suing for non-performance must aver and prove readiness to perform, or performance, § 558.

## III. CONDITIONS PRECEDENT.

1. *Truthfulness of description.*

Representations and warranties to be distinguished from conditions, § 559.

Description may be a condition precedent, § 560.

But this may be waived and suit brought on warranty, § 561.

When goods are accepted and retained after due opportunity of inspection, purchaser cannot sue for obvious variance from description, § 562.

Describing goods as "to arrive" by a ship is a condition precedent; describing them as on board a ship is a warranty, § 563.

Condition may on part performance be representation, § 564.

On sample sales purchaser should have opportunity of inspection, § 565.

Sale of negotiable paper implies genuineness, § 566.

2. *Notice.*

When required by contract, notice must be given, § 567.

Notice of goods "to arrive," § 568.

In insurance, notice of loss not required unless stipulated, § 569.

Guarantors and indemnifiers entitled to notice of acceptance, § 570.

And so of notice of default, § 570 *a*.

When debt is conditioned on event in creditor's peculiar knowledge, notice should be given, § 571.

Whether notice is received is a question of fact, § 572.

Drawer and indorser entitled to notice of dishonor, § 573.

Lessor's covenant to repair conditioned on notification, § 574.

3. *Request or demand.*

Prior demand not necessary to constitute indebtedness, § 575.

Demand necessary when implied in contract of bailment or other contract, § 576.

Bonds conditioned on payment on demand require demand, § 577.

4. *Delivery or other action by promisee.*

When payment is conditioned on delivery or completion, this is a condition precedent, § 579.

Successive instalments may be conditioned on discharge of duty on first, § 580.

In executory agreements, conveyance and payment may be concurrent, § 581.

But payment may precede delivery, § 582.

Purchaser may take risk of delivery, § 583.

In cash sales delivery and payment are concurrent, § 584.

Delivery of goods may be conditioned on supply of material, § 585.

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5. *Discretion of promisor.*

Promise dependent on promisor's choice is invalid, § 588.

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Burden is on party setting up devolution of property by conditions subsequent, § 609.

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Deeds of separation between husband and wife are revoked on renewed cohabitation, § 614.	On happening of condition subsequent title reverts, § 616.
Forfeitures may be waived, § 615.	Defeasible title passes to vendee, § 617.

## I.—DEFINITION AND ANALYSIS.

§ 545. A CONDITION is a limitation making a contract arbitrarily dependent on an event at the time uncertain.<sup>1</sup> Hence there can be no condition, in the proper sense of the term, when the limitation is one of the necessary incidents of the particular act: *conditiones tacitae*, or *quae insunt, tacite insunt, extrinsecus veniunt*.<sup>2</sup> Limitations of this class are usually mere matters of surplusage: “*frustra adduntur*.”<sup>3</sup>

Condition is a limitation on an uncertainty.

§ 546. A limitation dependent upon a present or past event is not technically a condition, “in praetoriturum vel praesens collata, relata, concepta conditio,” *e. g.* if Titius were consul last year, or if Titius be consul now. Such a provision may be effective, but the contract in such a case is not conditional, but absolute.<sup>4</sup> But when the limitation is as to an event which has transpired, but of which the parties are not yet advised, and which they look upon as a future event, it is to be regarded as a condition based on a future contingency. The condition is, “if I am advised next week of a particular fact, then I will be bound;” as where a party agrees to sell an imported commodity next week if a particular piece of intelligence by that time transpire of the failure of the crop of last year. We have several illustrations in the Roman standards of conditions as to past or present uncertain events.<sup>5</sup> “*Condiciones, quae praeteritum vel ad praesens tempus referentur, aut statim infirmant obligationem, aut omnino non differunt, veluti: si Titius consul fuit, vel si Maevius vivit, dare spondes?* Nam si ea ita non sunt,

Limitation must be as to an uncertainty.

<sup>1</sup> Savigny, *op. cit.* 122.

<sup>2</sup> L. 1, § 3, de Cond. (35-1); L. 99 eod. L. 25, § 1, quando dies (36. 2).

<sup>3</sup> See Lang. Cont. I. 999; Grey v. Friar, 4 H. L. Cas. 565; Coddington v. Paleologo, L. R. 2 Exch. 193; Clement v. Clement, 8 N. H. 210.

<sup>4</sup> See Savigny, *op. cit.* 126, citing L. 16, de injusto (28, 13), and other authorities. To same effect, see Olive v. Booker, 1 Exch. 416.

<sup>5</sup> § 6 I. de V. O. 3. 15; I. 37-39 D. de R. C. 12. 1; I. 100, 120, D. de V. O. 45. 1. § 6. L. cit.

nihil valet stipulatio; sin autem ita se habent, statim valet. Quae enim per rerum naturam sunt certa, non morantur obligationem, licet apud nos incerta sint.”—On the other hand, interesting questions were raised as to whether any future event was to be regarded as uncertain; but this was answered by saying that so far as we are concerned, all future is uncertain: “nec rerum naturam intuendam, in qua omnia certa essent, cum futura utique fierent, sed nostram inscientiam aspici debere.”<sup>1</sup> The question is whether “quantum in natura hominum sit, possit sciri.”<sup>2</sup> But in any view, if the event on which the condition depends is certain, then the promise is not conditional; “Qui sub condicione stipulatur, quae omnimodo exstatura est, pure videtur stipulari.”<sup>3</sup>

§ 547. A contract in which an impossibility is a condition precedent is of itself void.<sup>4</sup> “Si impossibilis condicio obligationibus adiciatur, nihil valet stipulatio. Impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, veluti si quis ita dixerit, si digito caelum attigero, dare spondes.”<sup>5</sup> Thus, in a case already cited, where the defendant was sued on a promise to give the use of a certain music hall on certain days, the continued existence of the music hall being a condition of the fulfilment of the contract, it was held a good defence that the hall was burned down before the time appointed.<sup>6</sup> But this rule does not prevail, as we have seen, where the *casus* or other obstacle set up

<sup>1</sup> L. 28, § 5 D. de Jud. (5. 1).

<sup>2</sup> L. 38 D. de R. C. (12. 1).

<sup>3</sup> L. 9, § 1 D. de nov. (46. 2). Mr. Langdell (1 Cont. 1000) maintains that “when the making of a covenant or promise depends upon whether a certain event has already happened, there is no condition of any kind. If the event has happened, the covenant or promise is absolute from the beginning; if the event has not happened, there is no covenant or promise at all.” To this he cites *Olive v. Booker*, 1 Exch. 416, and *Behn v. Burness*, 3 B. & S. 751. But this does not apply when the condition is the reception of intelligence to

be hereafter received as to the past event.

<sup>4</sup> *Harvy v. Gibbons*, 2 Lev. 161; *Gilpins v. Consequa*, Pet. C. C. 91; *Hughes v. Edwards*, 9 Wheat. 489; *Howell v. Cowpland*, L. R. 9 Q. B. 467; *Dickey v. Lenscott*, 20 Me. 453; *Knight v. Bean*, 22 Me. 531; *Stewart v. Loring*, 5 Allen, 306. See, also, to same effect, *Benj. on Sales*, 3d Am. ed. 570, citing *Faulkner v. Lowe*, 2 Ex. 595; *Hall v. Wright*, E. B. & E. 746; *Lovering v. Coal Co.*, 54 Penn. St. 291. See, for other cases, *supra*, § 329.

<sup>5</sup> § 11, I. de inut. stip. (3, 19).

<sup>6</sup> *Taylor v. Caldwell*, 3 B. & S. 826; *supra*, § 300 *et seq.*

does not absolutely prevent performance, though it may make performance extremely difficult or expensive;<sup>1</sup> nor where the performance can be by some other agency than that which it becomes impossible to use;<sup>2</sup> nor when it is a risk that the promisor took.<sup>3</sup> On the same reasoning a bond with an impossible condition is void.<sup>4</sup> "The object [of a bond] is to secure the performance of the condition, and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum. . . . On principle, therefore, a bond with an impossible condition, or a condition that becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible."<sup>5</sup> At the same time a bond to be void on the happening of an impossibility would bind; and so of a bond conditioned on an event which became impossible through the laches of the obligor.<sup>6</sup> *Legal* impossibility, as we have already seen, stands in this respect on the same basis as *physical* impossibility.<sup>7</sup> In no case can impossibility be set up as a defence by the party by whom it is brought about.<sup>8</sup>—Payment of the premium is a condition precedent to the recovery of insurance;<sup>9</sup> and though the duty may be suspended by a state of war between the country of the insured and that of the insurer,

<sup>1</sup> *White v. Mann*, 26 Me. 361; *supra*, §§ 300, 315.

<sup>2</sup> *Supra*, §§ 331, 315, 328; see *Mizell v. Burnett*, 4 Jones N. C. 249.

<sup>3</sup> *Supra*, § 311; *Hughes v. Edwards*, 9 Wheat. 489; *Lord v. Wheeler*, 1 Gray, 282; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530; *Beebee v. Johnson*, 19 Wend. 500; *Harmony v. Bingham*, 2 Kern. 106; *Delaware R. R. Co. v. Bowne*, 58 N. Y. 573; *Kribs v. Jones*, 44 Md. 396; *Merrill v. Bell*, 6 Sm. & M. 730; see *Howell v. Ins. Co.*, 44 N. Y. 276. In *Taylor v. Caldwell*, 3 B. & S. 826 (*supra*, § 300), the rule is stated to be that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is applied, that the impossibility arising from the perishing of

the person or thing shall excuse the performance." *S. P. Appleby v. Meyer*, L. R. 2 C. P. 651, reversing S. C., 1 C. P. 615; *Robinson v. Davison*, L. R. 6 Ex. 269; *Howell v. Cowpland*, L. R. 9 Q. B. 462; *aff. L. R. 1 Q. B. 258*; *Russell v. Levy*, 2 Low. Can. 457, cited *Benj. on Sales*, 3d Am. ed. 555. In *Dexter v. Norton*, 47 N. Y. 62, a contract to sing was held to be conditioned on the defendant's capacity to sing, and that sickness producing incapacity was a defence.

<sup>4</sup> *Supra*, § 329.

<sup>5</sup> *Pollock*, *Wald's ed.* 377.

<sup>6</sup> *Supra*, § 309.

<sup>7</sup> *Supra*, § 305.

<sup>8</sup> *Supra*, §§ 309, 312; *infra*, §§ 603, 661.

<sup>9</sup> *Roshner v. Ins. Co.*, 63 N. Y. 160; *Evans v. Ins. Co.*, 64 N. Y. 304.

that a tender of the overdue premiums, after peace, renews the policy.<sup>1</sup> But the insanity of the insured does not have this effect.<sup>2</sup>

§ 548. While the condition is still undetermined, the promise, so far as concerns any legal efficiency, is suspended. "Ante condicionem non recte agi, cum nihil interim debeatur."<sup>3</sup> But the promise is not on this account to be treated as a nullity. A party conveying away his property to escape an indebtedness would expose himself to process under the statutes making penal fraudulent insolvency, and any assertions based on a negation of such indebtedness would sustain an action for deceit, but the conveyance would stand if the indebtedness were cleared. Contracts of this class are like contracts by infants; their efficiency is suspended for the time, but they nevertheless exist.<sup>4</sup> The Roman jurists speak on several occasions to this effect.<sup>5</sup> The promisee, also, in such a contract, has a right susceptible of valuation, of taxation, and of assignment. The promisor is not to be bound only in the future; he is bound from the time he makes the promise; and the title he passes vests subject to the condition. Any intermediate disposition of the title made by the promisor before the happening of the condition is subject to the condition. A. may promise, for instance, to give B. an estate upon B.'s marriage, and may intermediately convey this estate to C., but C.'s interest expires when B. marries, and the estate passes to B.—The promisor, also, who agrees to convey an estate on a future contingency, is liable in damages if he makes his compliance with his promise impossible, or subjects the property to waste.<sup>6</sup>

§ 549. Whether a promise to pay at some future date is to be regarded as conditional has been questioned; though in contracts in which the whole debt be-

Promises to  
pay in

<sup>1</sup> Cohen v. Ins. Co., 50 N. Y. 610; Sands v. Ins. Co., 50 N. Y. 626, *supra*, § 476.

<sup>2</sup> Wheeler v. Ins. Co., 82 N. Y. 545.

<sup>3</sup> L. 13, § 5 D. de pign. (20, 1); *supra*, § 16.

<sup>4</sup> *Supra*, §§ 2, 28.

<sup>5</sup> See citations in Windscheid, § 89.

<sup>6</sup> *Infra*, §§ 549, 601 *et seq.* So, in the Roman law, Wächter, ii. p. 700; Windscheid, § 89. That a party who makes the condition impossible cannot set up the impossibility, see *supra*, § 312.



comes immediately payable on failure of payment of interest, there is no question that the promise is conditioned by the duty to pay interest punctually. But be this as it may, there is high authority to the effect that a promise to pay a debt *in futuro* is to be regarded as a promise conditioned by time.<sup>1</sup> And it is plain that when the date of payment is fixed *in futuro*, the promise is so far conditioned that there can be no suit upon it until the time of payment arrives.<sup>2</sup> Whether this condition exists, is to be determined from all the circumstances of the case.<sup>3</sup> Taking in payment of goods a bill of exchange, payable at a future date, for instance, postpones the period when the price of the goods, as thus liquidated, can be sued for, until the maturity of the bill; but if the bill be not given, in conformity with the contract of sale, then the price of the goods can be at once recovered.<sup>4</sup>—As will be hereafter seen, the acceptance of immature negotiable paper on account, operates as conditional payment;<sup>5</sup> though such paper may be accepted in satisfaction of the debt.<sup>6</sup>

future may be regarded as conditional.

§ 550. A condition being a limitation upon a contingency, there are two ways in which it may operate; first, when the contract does not go into effect until the contingency, which is called a suspensive condition; and secondly, when its effect is terminated by the contingency, which is called a resolute or destructive contingency. Of suspensive conditions, Savigny enumerates three phases: The first is the state of indecision which arises from the nature of the condition (*pendat conditio*). Here a right does not yet exist, and its future existence is made more or less dependent on the will of the parties in interest. This condition can be modified in two ways: (1) The contingency may actually occur;—the condition, in

In Roman law, conditions are suspensive or resolute.

<sup>1</sup> Leake, 2d ed. 634; see Holmes v. 431; see Stockton Iron Co. *in re*, L. R. 2 C. D. 101; Hanna v. Mills, 21 Wend. 90; Rinehart v. Olwine, 5 Watts & S. 157; *infra*, §§ 881 *et seq.*, 953 *et seq.*

<sup>2</sup> *Infra*, §§ 882 *et seq.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Mussen v. Price, 4 East, 147; Dutton v. Solomonson, 3 B. & P. 582; Helps v. Winterbottom, 2 B. & Ad.

<sup>5</sup> *Infra*, § 956.

<sup>6</sup> *Infra*, § 957.

other words, is fulfilled, *impleta* or *expleta conditio*, by which the contract becomes unconditionally obligatory.<sup>1</sup> The second is the converse, when the contingency does not occur, *deficit conditio*, in which case the expectation of the obligatory force of the contract is finally abandoned.

§ 551. In our own law, the same distinction is recognized though with a different nomenclature. Conditions suspensive are called by us conditions precedent, while conditions resolutive are substantially the same as our conditions subsequent. A condition precedent must be satisfied before the promise it qualifies becomes effectual; *e. g.*, I promise to send goods to A. if A. first sends a cheque for them, in which case my promise does not bind me until A. sends me the cheque. A condition subsequent does not preclude the promise from being at once obligatory, but provides for its rescission upon the happening of a future contingent event.<sup>2</sup> But the distinction between a condition precedent and a condition subsequent is rather formal than real. There is no condition precedent that is not in one sense a condition subsequent; *i. e.*, there is no condition precedent that does not interpose to prevent the performance of a contract by which the parties are already bound. And there is no condition subsequent that is not a condition precedent,—*i. e.*, there is no condition subsequent that is not precedent to the as yet unperformed subject matter of the contract. There are no conditions, also, which are not both conditions precedent and conditions subsequent. The payment of an insurance premium, for instance, is at once a condition precedent, and condition subsequent to the insurance.<sup>3</sup>—On a bond with a penalty, the condition is in form a condition subsequent, as it attests a general indebtedness to be released when a specific thing is done; yet in substance it is a condition precedent, since something must take place before suit can be brought.<sup>4</sup> So in the cases hereafter men-

<sup>1</sup> Savigny, *op. cit.* 250, citing L. 26 de cond. inst. (28, 7).

<sup>2</sup> See *Clement v. Clement*, 8 N. H. 210; *Goodwin v. Holbrook*, 4 Wend. 377.

<sup>3</sup> *People v. Ins. Co.*, 78 N. Y. 114; *Wheeler v. Ins. Co.*, 82 N. Y. 545.

<sup>4</sup> See *Gray v. Gardner*, 17 Mass. 188.

tioned, it is a condition precedent to the validity of indentures of apprentice, that the master should be able to instruct the apprentice, while failure to instruct arising from incapacity is a condition subsequent which vacates the indenture.<sup>1</sup> The same may be said of all contracts to be performed on the happening of a certain event. The contract binds from the time it is made, and ceases to bind on the non-occurrence of a certain event, which is, therefore, in this sense, a condition subsequent. Yet performance does not take place until the occurring of the event, which is, therefore, a condition precedent.<sup>2</sup> The same remark is made by Windscheid, in reference to the distinction as now recognized in the Roman law.<sup>3</sup>

§ 552. It may be that a party agrees to do a series of things conditioned upon certain things being done by the other party. It depends upon the terms of the contract whether the conditions are divisible. As a rule, it may be said that where each of the things to be done by the one party is conditioned upon a specified act by the other party, then the performance of each thing may be separately compelled.<sup>4</sup> Thus, where a land-owner agrees to let land for building purposes, and on this land a builder is to put a series of houses, and to receive leases on the houses when built on separate ground rents, the builder, it has been held, is entitled to receive a lease on each house when completed, without being compelled, as a condition precedent, to finish the other houses.<sup>5</sup>—The question is, whether the subject of the condition is so divisible that its component parts may be apportioned, at least so far as concerns one or more members, to the corresponding part of the promise. If this cannot be done, all the alternative parts of the condition are to be performed before the promisee can recover. Thus, if A. promises to do two distinct things on the happening of two distinct events, he is not compellable to do either until both events happen.<sup>6</sup>

<sup>1</sup> See *infra*, § 613.

<sup>2</sup> See *Wilson v. Ins. Co.*, 27 Vt. 99; *Amesbury v. Ins. Co.*, 6 Gray, 596.

<sup>3</sup> Windscheid, *Pandekt.* § 86.

<sup>4</sup> See *infra*, § 607; *Lang. Cont.* ii. 96.

1007; *Neale v. Ratcliff*, 15 Q. B. 916.

As to divisible considerations, see *supra*, § 511; as to divisible promises, see *supra*, § 338.

<sup>5</sup> *Wilkinson v. Clements*, L. R. 8 Ch.

<sup>6</sup> *Neale v. Ratcliff*, 15 Q. B. 916.

On the other hand, he may bind himself to do a particular thing on the occurrence of one out of several events.<sup>1</sup> It should be remembered that entirety depends upon the intention of the parties, and not upon the divisibility of the price or the thing to be delivered. Price or thing to be delivered may be divisible; and yet, if intended by the parties, the contract may be entire.<sup>2</sup> But the fact that purchase money is payable at distinct intervals, leads to the inference of divisibility;<sup>3</sup> and so does the fact that each article in a sale has a distinct price.<sup>4</sup>

## II. CONSTRUCTION.

§ 553. If there appear on the whole contract an intention that either party is to have redress in damages for the default of the other, irrespective of the question of his own default, then mere formal expressions denoting interdependence will be made to yield to the substantial purpose of the contract. This has been held to be the case with contracts providing that a promise is conditioned on the other party "well and truly performing all and singular his covenants and agreements," or "on the performance of the terms and conditions" imposed on the other party. All this, when from the whole document it appears that a promise made by one party was to have independent redress irrespective of the default of the other party, will be regarded as purely formal and inoperative.<sup>5</sup>—In order to ascertain the intention of the parties, the whole context of the contract is to be taken into consideration, in view of all

Formal expressions of condition not to overrule real intention.

<sup>1</sup> *Infra*, § 619.

<sup>2</sup> *Shinn v. Bodine*, 60 Penn. St. 182; see *infra*, § 899.

<sup>3</sup> *Morgan v. McKee*, 77 Penn. St. 228.

<sup>4</sup> *Lucesco Oil Co. v. Brewer*, 66 Penn. St. 351.

<sup>5</sup> *Leake*, 2d ed. 652; *Boone v. Eyre*, 2 W. Bl. 1312; *Stavers v. Curling*, 3 Bing. N. C. 355; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; *Keenan v. Brown*, 21 Vt. 86; *Tufts v. Kidder*, 8 Pick. 537; *Kane v. Hood*, 13 Pick.

281; *Knight v. Worsted Co.*, 2 Cush.

286; *Dodge v. Gardiner*, 31 N. Y. 239;

*Todd v. Summers*, 2 Grat. 167. That

a general covenant of title is restrained

by special covenants among which it

occurs, see *Browning v. Wright*, 2 B. &

P. 13, 26; *Hesse v. Stevenson*, 3 B. &

P. 565; *Sumner v. Williams*, 8 Mass.

162; *Whallon v. Kauffman*, 19 Johns.

99; *Miller v. Heller*, 7 S. & R. 32; and

see *infra*, § 664.

the extrinsic facts.<sup>1</sup> Contracts of this class, as is the case with all contracts, are to be construed consistently with the true intent of the parties,<sup>2</sup> so as best to sustain good faith.<sup>3</sup>

§ 554. "Whether covenants are to be held dependent or independent of each other is to be determined by the intention of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."<sup>4</sup>—Lord Mansfield lays down as a rule, which Mr. Benjamin<sup>5</sup> declares to be unchanged, "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance."—Hence, where the condition of a bond for £1000 was to render a fair and just account in writing of all sums received, it was held that the word "account" meant payment, since it was not to be supposed that the parties would impose so heavy and solemn a penalty on mere accounting without paying.<sup>6</sup> The intention of the parties, as evidenced in the contract, is to determine whether the allegation in question is a condition precedent, whose performance is necessary to make the contract binding on the other party, or a representation, which does not interfere with the contract taking effect, though if false it exposes the party making it to a cross suit.<sup>7</sup> Whether the promise is on its face conditional,

Whether a stipulation is a condition depends on intention of parties.

<sup>1</sup> 1 Wms. Saund. 320 *a*; *Graves v. Legg*, 9 Exch. 709; *Dicker v. Jackson*, 6 C. B. 103; *Jowett v. Spencer*, 1 Exch. 647; *Kingdom v. Cox*, 5 C. B. 522; *Couch v. Ingersoll*, 2 Pick. 292; *Kane v. Hood*, 13 Pick. 282; *Knight v. Worsted Co.*, 2 Cush. 286.

<sup>2</sup> *Infra*, §§ 657–9.

<sup>3</sup> *Infra*, § 654.

<sup>4</sup> Per cur., *Stavers v. Curling*, 3 Bing. N. C. 368; adopted in *Leake*, 2d ed. 649; see also notes to *Cutter v. Powell*, 2 Smith, L. C. 1; see *infra*, §§ 650 *et seq.*

<sup>5</sup> *Sales*, 3d Am. ed. § 561, citing *Jones v. Barkley*, 2 Doug. 684.

<sup>6</sup> *Bache v. Proctor*, 1 Doug. 382.

<sup>7</sup> *Infra*, § 650; *Benj. on Sales*, 3d Am. ed. 561; *Howland v. Leach*, 11 Pick. 151; *Mill Dam Foundry v. Hovey*, 21 Pick. 439; *Knight v. Worsted Co.*, 2 Cush. 287; *Booth v. Mills Co.*, 74 N. Y. 15; *Phillip v. Allegheny Car Co.*, 82 Penn. St. 368; *Brockenbrough v. Ward*, 4 Rand. 352; *Moore v. Waldo*, 69 Mo. 277.

or whether words used in connection with it subject it to a condition, is a matter of law for the court, supposing those words to be proved.<sup>1</sup>

<sup>1</sup> Leake, 2d ed. 219, citing *Furness v. Meek*, 27 L. J. Ex. 34. In *Hale v. Finch*, Sup. Ct. U. S. 1881, the suit was based on a contract between the California Steam Navigation Company and the Oregon Steam Navigation Company, by which the latter company, engaged in the navigation of the Columbia river and its tributaries, purchased a steamboat, called the *New World*, from the California Steam Navigation Company, then engaged in like business upon the rivers, bays, and waters of the state of California.

The terms of the sale are embodied in a written agreement, from which it appears that the consideration was \$75,000, and the covenant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the said steamboat *New World* upon any of the routes of travel upon the rivers, bays, and waters of the state of California for the period of ten years from the first day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel, or craft upon any of the routes of travel, or on the rivers, bays, or waters of" that state for that period. The Oregon Steam Navigation Company, in that agreement, further stipulated, that in case of any breach of their covenant and agreement, they would pay the California Steam Navigation Company the sum of \$75,000 in gold coin of the United States "as actual liquidated damages," such stipulation, however, not to have the effect to prevent the latter from taking such other remedy, by injunction or otherwise, as they might be advised.

"The written memorandum," said

Harlan, J., "between that company (the Oregon) and the California Steam Navigation Company, in words aptly chosen, shows, as we have seen, an express covenant and agreement, upon the part of the former, that neither the *New World* nor its machinery shall be used on the waters of California within ten years from May 1, 1864, and, also, to pay a certain sum as actual liquidated damages for any breach of such covenant and agreement. The bill of sale from the Oregon Steam Navigation Company to Winsor and his associates did not contain any words of covenant or agreement. But the company, in view of its express covenants to the California Steam Navigation Company, took care to exact from its vendees a separate written obligation, in which the latter, in express terms, covenanted and agreed with that company, in like manner as the latter had covenanted and agreed with the California Steam Navigation Company. The next writing executed was the bill of sale from Winsor to Hale. That instrument shows nothing more than a covenant to warrant the title to the steamboat. It makes no reference, in any form, to any waters from which the steamboat should be excluded. Then comes the bill of sale executed by Hale to Finch. Its material portions are the same in substance, and in language almost identical with the bill of sale given by the Oregon Steam Navigation Company to Winsor. Each contains a covenant and agreement, upon the part of the vendor, simply to warrant and defend the title to the steamboat, its machinery, etc., against all persons whomsoever. But each recites, let it be observed, only an agreement that the

§ 555. The whole context, also, of the document is to be considered.<sup>1</sup> The effect of the condition cannot be determined

sale is upon the express condition that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties, knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

"If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the *New World*, the absence, as well from the bill of sale accepted by him, as from the written agreement of the same date, signed by him and Hale, of any covenant or agreement that he would not use that vessel, or permit it to be used, on the prohibited waters within the period prescribed, quite

conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

"It thus appears that the circumstances separately considered, militate against the construction for which plaintiff contends.

"But, if we omit all consideration of the circumstances under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, are necessary in order to charge a party with covenant. 1 Roll. Abridg. 518; 1 Burr. 290; 1 Vesey, 516; Sheppard's Touchstone, 161, 162; *Courtney v. Taylor*, 7 Scott, N. R. 765; 2 Parsons' Contracts, 510. 'The law,' says Bacon, 'does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant.' Bacon's Abridgment, Covenant, A. So, in Sheppard's Touchstone, 161-2, it is said: 'There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever words it be set down, for

<sup>1</sup> *Pearsall v. Summersett*, 4 Taunt. 593; *Hassell v. Long*, 2 M. & S. 363; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Bell v. Bruen*, 1 How. (U. S.) 169;

*Worcester Bk. v. Reed*, 9 Mass. 267; *Russell v. Nicoll*, 3 Wend. 42; *Benedict v. Field*, 16 N. Y. 595; *Ramsey v. R. R.*, 3 Tenn. Ch. 170; *infra*, § 662.

without taking into consideration the stipulations that it qualifies,<sup>1</sup> and it will be construed, as far as possible, so as to give efficiency to the entire contract.<sup>2</sup> The construction depends "upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject matter to which it relates."<sup>3</sup> Whether a provision in a contract is a stipulation (exposing the party making it to a suit for damages), or a condition (precluding him from suing until the time prescribed takes place), is to be gathered from the whole document. If the thing in question is something to be done by the party promising (*e. g.*, where a party undertaking to ship corn engages to provide the means of transportation),

anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement.' 'Sometimes,' says Mr. Parsons, 'words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties.' 2 Parsons' Cont. 510-11. There are also cases in the books in which it has been held that even a recital in a deed may amount to a covenant. *Farrall v. Hilditch*, 5 C. B. N. S. 852; *Great Northern R. W. Co. v. Harrison*, 12 C. B. 609; *Severn v. Clark*, 1 Leon. 122. And there are cases in which the instrument to be construed was held to contain both a condition and a covenant; as, 'if a man by indenture letteth lands for years, provided always, and it is covenanted and agreed, between the said parties, that the lessee should not alien.' It was adjudged that this was 'a condition by force of the proviso, and a covenant by force of the other words.' *Coke Litt.* 203 b.

"But according to the authorities, including some of those above cited, and

from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged, for the performance or non-performance of some act. *Comyns*, in his *Digest* (Covenant, A 2), says that 'any words in a deed which show an agreement to do a thing, make a covenant.' 'But,' says the same author, 'where words do not amount to an agreement, covenant does not lie; as, if they are merely conditional to defeat the estate; as, a lease, provided and upon condition that the lessee collect and pay the rents of his other houses.' *Comyns' Dig.*, Covenant A 3. The language last quoted is found also in *Platt's Treatise on the Law of Covenants*. Law Library, vol. 3, p. 17."

<sup>1</sup> *Boyd v. Siffkin*, 2 Camp. 326; *Lovett v. Hamilton*, 5 M. & W. 639.

<sup>2</sup> *Stockdale v. Dunlap*, 6 M. & W. 224; *Johnson v. McDonald*, 9 M. & W. 600; *infra*, § 667.

<sup>3</sup> *Tindal, C. J., Glaholm v. Hays*, 2 Man. & G. 266.



this is an independent promise; where it is to be done by the other party (*e. g.*, where the corn is to be shipped provided the other party sends for it), then it is a condition to be performed by the promisee before the promisor is bound.<sup>1</sup>

§ 556. It may happen that whether a particular allegation is a representation or a condition may depend on extraneous facts. "If a vessel were described in a charter party as a French vessel, the words would be merely a description in time of peace; but if England were at war and France at peace, with America, they would form a condition precedent of the most vital importance."<sup>2</sup> In such case parol evidence is admissible of the extrinsic explanatory facts.<sup>3</sup>

Extrinsic facts admissible to explain.

§ 557. "Where a day is appointed for doing any act, and the day *is* to happen or *may* happen before the promise of the other party is to be performed, the latter may bring action before performance, which is not a condition precedent; *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed a condition precedent."<sup>4</sup> Where from the nature of things the performance on the one side is conditioned on something to be done by the other, as where goods to be worked on by A. for B. have first to be furnished by B. to A., then the condition must be satisfied before the liability accrues.<sup>5</sup> As will be hereafter seen, when no time is fixed for performance, a reasonable time is implied;<sup>6</sup> when the time is designated, the full limit is to be allowed;<sup>7</sup> though a party disabling himself may be made liable in damages immediately on the breach.<sup>8</sup> Punctuality is waived by acceptance, or by giving

Time of performance of alleged conditions material.

<sup>1</sup> See Lang. Cont. II. 1004-5. *Infra*, §§ 641 *et seq.*

<sup>2</sup> Benj. on Sales, 3d Am. ed. 563; citing Behn v. Burness, 3 B. & S. 751.

<sup>3</sup> Wh. on Ev. § 953.

<sup>4</sup> Note by Williams to 1 Wms. Saund. 320 b; adopted in notes to Cutter v. Powell, 2 Sm. L. C. 1, and given as text in Benj. on Sales, 3d Am. ed. 547; citing Allard v. Belfast, 40 Me. 376;

Putnam v. Mellen, 34 N. H. 71; Sumner v. Parker, 36 N. H. 449.

<sup>5</sup> Clement v. Clement, 8 N. H. 210; Hill v. Hovey, 26 Vt. 109; Savage Man. Co. v. Armstrong, 19 Me. 147; Mill Dam Foundry v. Hovey, 21 Pick. 439.

<sup>6</sup> *Infra*, § 882.

<sup>7</sup> *Infra*, § 884.

<sup>8</sup> *Infra*, § 885 a.

time in negotiation.<sup>1</sup> Time may be made of essence by special contract,<sup>2</sup> or by notice.<sup>3</sup>

§ 558. Where promises relate to the same object, and are jointly conducive to the furtherance of a common enterprise, then one party cannot charge the other with the consequences of failure without averring and showing that he either performed or was ready to perform his part. The question in such cases is, are the promises reciprocally dependent? If they are, the rule just stated obtains. If they are not, then one party can sue the other party for failure without averring and proving that he himself has performed or was ready to perform his own share of the undertaking.<sup>4</sup> Mr. Benjamin<sup>5</sup> adopts substantially the follow-

When acts are to be reciprocally dependent, a party suing for non-performance must aver and prove readiness to perform on his own part.

<sup>1</sup> *Infra*, § 891.

<sup>2</sup> *Infra*, § 887.

<sup>3</sup> *Infra*, § 892. That this applies to conditional contracts, see *Benninger v. Hankee*, 61 Penn. St. 343.

<sup>4</sup> *Infra*, §§ 581, 606; *Leake*, 2d ed. 650; citing *Pordage v. Cole*, 1 Wms. Saund. 320 *e*; *Benj. on Sales*, 3d Am. ed. § 592; *Doogood v. Rose*, 9 C. B. 132; *Giles v. Giles*, 9 Q. B. 164; and see *Cook v. Jennings*, 7 T. R. 381; *Howe v. Huntington*, 15 Me. 350; *Smith v. Lewis*, 26 Conn. 110; *Gazley v. Price*, 16 Johns. 267; *Campbell v. Gittings*, 19 Ohio, 347; *Hough v. Rawson*, 17 Ill. 588; *Grandy v. McLees*, 2 Jones, L. 142; and see cases cited *infra*, § 606. Lord Ellenborough, *Ritchie v. Atkinson*, 10 East, 306, following Lord Mansfield, *Boone v. Eyre*, 1 H. Bl. 273 *n*, 2 W. Bl. 1, 314, stated the rule to be that "when mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, then a remedy lies on the covenant to recover damages

for the breach of it; but it is not a condition precedent." See, also, *Bettini v. Gye*, L. R. 1 Q. B. D. 183; *Poussard v. Spiers*, L. R. 1 Q. B. D. 410. As sustaining the position in the text, see further, *Warren v. Wheeler*, 21 Me. 484; *Jones v. Marsh*, 22 Vt. 144; *Dana v. King*, 2 Pick. 155; *Howland v. Leach*, 11 Pick. 151; *Smith v. Lewis*, 26 Conn. 110; *Gazley v. Price*, 16 Johns. 267; *Williams v. Healey*, 3 Denio, 363; *James v. Burchell*, 82 N. Y. 109; *Long v. Caffrey*, 93 Penn. St. 526; see, also, remarks of Storrs, C. J., in *Smith v. Lewis*, 26 Conn. 110, as quoted *infra*, § 606; *Newman v. Perrill*, 73 Ind. 153; *Skidmore v. Eikenberry*, 49 Iowa, 621; *Drake v. Hill*, 54 Iowa, 37; *Gjerness v. Matthews*, 27 Minn. 320; *Winona v. R. R.*, 27 Minn. 415; *Ernst v. Cummings*, 55 Cal. 179. "When conditions are interdependent, one party cannot put the other in default" without tender of performance, or at least proof of a readiness and willingness to perform. *Finch, J.*, *Levy v. Loeb*, 85 N. Y. 372. As to tender, see *infra*, § 970. That in in-

<sup>5</sup> *Sales*, 3d Am. ed. § 562.

ing distinctions, being the third and fourth of Mr. Sergeant Williams': "Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent; formerly called dependent conditions."<sup>1</sup> "Where each party is to do an act at the same time as the other, as where goods in a sale, for cash, are to be delivered by the vendor, and the price to be paid by the buyer, these are concurrent conditions, and neither party can maintain an action for breach of contract, without averring that he performed or offered to perform what he himself was bound to do."<sup>2</sup> "In determining whether the stipulations as to the time of performing a contract of sale are conditions precedent," Mr. Benjamin states, "the court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent."<sup>3</sup> But where the understanding of the parties appears to have been that each would be entitled to redress in damages in case of the other's default, without regard to the question whether he was in default himself, then he can bring suit without averring on his own part performance or readiness to perform.<sup>4</sup> In other words, when the

insurance contracts, the payment of premiums is at once a condition precedent and condition subsequent, see *supra*, § 551. That substantial performance of a condition must be shown, see *infra*, § 607.

<sup>1</sup> Citing *Glazebrook v. Woodrow*, 8 T. R. 366; *Mill Dam Foundry v. Hovey*, 21 Pick. 439; *Knight v. Worsted Co.*, 2 Cush. 285; *Dox v. Dey*, 3 Wend. 356; *Cole v. Hester*, 9 Ired. 23.

<sup>2</sup> See *infra*, §§ 601 *et seq.*; *Gazley v. Price*, 16 Johns. 267; *Clark v. Weis*, 87 Ill. 438.

<sup>3</sup> *Benj. on Sales*, 3d Am. ed. § 593; as to time, see *infra*, §§ 881 *et seq.*

<sup>4</sup> *Roberts v. Brett*, 18 C. B. 573; *Pordage v. Cole* has been the subject of constant dispute. Lord Kenyon (*Goodisson v. Nunn*, 4 T. R.

761), said that it "outraged common sense." Mr. Langdell, who discusses the points involved at great length and with much subtlety, thinks "that by the true construction of the contract in that case, the land was to be conveyed when the money was paid, and hence, the covenants were mutually dependent by implication" (*Lang. Cont.* II. 1067); and argues, that it is virtually overruled by *Marsden v. Moore*, 4 H. & N. 500. On the other hand, Mr. Pollock, 3d ed. 401, contents himself with speaking of the note of Serjeant Williams, to *Pordage v. Cole*, as "the classical authority on this topic;" and Mr. Leake (2d ed. 649, 650, 652) accepts it as apparently settled law. *Pordage v. Cole* is further discussed *infra*, § 580.

stipulations in a contract are independent, each party has his remedy on the contract without averring and proving on his part performance or readiness to perform.<sup>1</sup> A contract, however, may be so constructed, that the stipulations on one side may be dependent, and on the other side, independent.<sup>2</sup> But when this is not the case, and when the stipulations are interdependent, a defendant cannot be sued for non-performance of stipulations on his part which were dependent on conditions which the plaintiff has not performed, unless release or waiver be shown.<sup>3</sup> When one party refuses to perform a condition precedent, the other party may treat the contract as rescinded;<sup>4</sup> and so when the party privileged waives or prevents performance;<sup>5</sup> and the failure of both parties to a contract to perform the conditions assumed by them, will constitute a waiver on the part of each of the default of the other, and either may tender the performance of his stipulation within reasonable time, and enforce the performance of the contract against the other.<sup>6</sup>

### III. CONDITIONS PRECEDENT:

#### 1. *Truthfulness of description.*

§ 559. We have already seen that a representation is to be distinguished from a warranty in this, that while a warranty forms a basis for a suit no matter to what point it goes, a misrepresentation, to form a basis for a suit, must be material, and must have been productive of injury to the purchaser.<sup>7</sup> We have also

Representations and warranties to be distinguished from conditions.

<sup>1</sup> *Infra*, § 606; 2 Ch. on Cont. 11th Am. ed. 1086; *Franklin v. Miller*, 4 A. & E. 599; *Lucas v. Godwin*, 4 Scott, 502; *Allard v. Belfast*, 40 Me. 369; *Putnam v. Mellen*, 34 N. H. 71; *Knight v. Worsted Co.*, 2 Cush. 271; *Beecher v. Conradt*, 3 Kern. 108.

<sup>2</sup> *Dey v. Dox*, 9 Wend. 133.

<sup>3</sup> See *supra*, §§ 545 *et seq.*; *infra*, §§ 601 *et seq.*, 869 *et seq.*; *Johnassohn v. R. R.*, 10 Exch. 434; *Mawman v. Gillett*, 2 Taunt. 327; *Chapin v. Norton*, 6 McLean, 500; *Dodge v. Greeley*, 31

Me. 343; *Clement v. Clement*, 8 N. H. 210; *Snow v. Prescott*, 12 N. H. 535; *Ott v. Lyons*, 2 Whart. 441; *Lykens v. Tower*, 27 Penn. St. 462; *Schilling v. Durst*, 42 Penn. St. 126.

<sup>4</sup> *Supra*, § 190; *infra*, §§ 601 *et seq.*, § 898; *Fletcher v. Cole*, 23 Vt. 114; *Goodrich v. Laffin*, 1 Pick. 57; *Dubois v. Canal Co.*, 4 Wend. 285.

<sup>5</sup> *Infra*, §§ 602, 904 *et seq.*

<sup>6</sup> *Brown v. Slee*, 103 U. S. 828.

<sup>7</sup> *Supra*, §§ 212, 216; *infra*, § 560.

seen that a condition is distinguishable from a representation in this, that where there is a condition there is no absolute concurrence to an immediately operative agreement; while a false representation, provided it goes not to identity but to quality, assumes a concurrence at least as to the thing which may be at once done or delivered, and a warranty expressly assumes a concurrence as to a thing which may be immediately delivered, and binds the vendor to give damages in case it fails in certain requisites.<sup>1</sup> A condition precedent, also, is an integral part of the contract which it qualifies; the contract cannot be severed from the condition. Representations and warranties, on the other hand, are severable from the contract to which they are attached, and may form the basis of cross-suits. The non-performance of the condition prevents the contract from taking effect; the falsity of a representation or warranty does not prevent (if the parties had the same thing in mind) the contract from taking effect, but exposes the vendor to a suit for damages by the purchaser.<sup>2</sup> To relieve a party, however, from a contract on the ground that the other party refuses to perform a condition precedent, the refusal must be specific and absolute, and must be so regarded on both sides.<sup>3</sup> If, for instance, I continue to urge the performance of the condition on the party whose duty it is to perform it, this treats the contract as still in force.<sup>4</sup>

<sup>1</sup> *Supra*, § 218.

<sup>2</sup> *Benj. on Sales*, 3d Am. ed. § 561; *Wilson Sewing Mach. Co. v. Sloan*, 50 Iowa, 367. As to "puffs," as distinguished from representations, see *supra*, § 267. As illustrating the distinction above given, Mr. Benjamin (*Sales*, 3d Am. ed. § 561) notices cases on charter parties, "where a statement that a vessel is to sail, or to be ready to receive cargo on a given day, has been decided to be a condition (*Glaholm v. Hays*, 2 M. & G. 257; *Oliver v. Fielden*, 4 Ex. 135; *Seeger v. Duthrie*, 8 C. B. N. S. 45), but a stipulation that she shall sail with all convenient speed, or within a reasonable time, is held to be an independent agreement." *Tarrabo-*

*chia v. Hickie*, 1 H. & N. 183; *Dimach v. Corlett*, 12 Moore P. C. 199; *McAndrew v. Chapple*, L. R. 1 C. P. 643. That where one party refuses to perform the condition precedent the other may abandon the contract, and sue for the losses he has sustained, see 2 Ch. Cont. 11th Am. ed. 1090; *Dodge v. Greeley*, 31 Me. 343; *Webb v. Stone*, 24 N. H. 282; *Hill v. Hovey*, 26 Vt. 109.

<sup>3</sup> See *infra*, §§ 602, 901.

<sup>4</sup> *Benj. on Sales*, 3d Am. ed. § 568; *Notes to Cutter v. Powell*, 2 Sm. L. C. 1, citing *Barrick v. Buba*, 2 C. B. N. S. 563; *Avery v. Boden*, 5 E. & B. 714; *Danube R. R. v. Xenos*, 11 C. B. N. S. 152; 13 C. B. N. S. 825; *Smoot's case*, 15 Wall. 36; see *infra*, §§ 604, 891.

§ 560. Throwing out of consideration misrepresentations which do not amount to misdescriptions, we have now, in the present relation, to recur to the important distinction between descriptions amounting to conditions precedent, on the one side, and warranties, on the other side. This distinction is noticed by Lord Abinger in a passage adopted by Mr. Benjamin:<sup>1</sup> “A good deal of confusion has arisen in many of the cases on this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, *collateral to the express object of it*. But in many of the cases, the circumstance of a party selling the particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell peas, and if he sell anything else in their stead, it is a non-performance of it.” In other words, a warranty supposes a contract, since there can be no warranty without a contract to which it is collateral; while a misdescription going to the identity of the thing excludes the idea of a contract, since there can be no contract when the parties have essentially different things in contemplation.<sup>2</sup> Hence a description going to identity or substantial character of a thing sold is a condition precedent, the non-compliance with which bars a suit by the vendor, or justifies the vendee in throwing up the contract.<sup>3</sup> As illustrating the distinction above given, may be

<sup>1</sup> *Chanter v. Hopkins*, 4 M. & W. 399; *Benj. on Sales*, 3d Am. ed. § 600.

<sup>2</sup> *Supra*, §§ 4 *et seq.*, 186, 218.

<sup>3</sup> *Supra*, §§ 186-7. Mr. Benjamin (*Sales*, § 600), after citing the above given passage from Lord Abinger, says: “There can be no doubt of the correct-

ness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or, if he

cited an English case,<sup>1</sup> where the sale was of "foreign refined rape oil, warranted only equal to samples." *The oil corresponded with sample* (the italics are Mr. Benjamin's), but the jury found that the article sold was not "foreign refined rape oil." There was a difference, therefore, not as to quality but as to identity. It was held that the sample warranty only extended to quality, and did not touch the generic question of identity. "If a man contracts to buy a thing," said Pollock, C. B., "he ought not to have something else delivered to him."<sup>2</sup> A more recent illustration, to the same effect, is to be found in a case<sup>3</sup> where a sale was of cotton, through a broker, in what was known as a certified London contract, which was as follows: "Sold by order and for account of Messrs. J. C. Azémar & Co. to Messrs. Casella & Co., the following cotton, viz.,  $\frac{D. C.}{C.}$  128

bales, at 25*d.* per pound, expected to arrive in London, per Cheviot, from Madras. The cotton guaranteed equal to sealed sample in our possession," etc. The cotton, when delivered, turned out to be "Western Madras," an article not only inferior to "Long Staple Salem," of which was the sample, but requiring different machinery for its manufacture. The contract contained a clause, "Should the quality prove inferior to the guaranty, a fair allowance to be made." It was held that this was not a question of quality but of kind; that it was a condition precedent that the cotton should be "Long Staple Salem," and that it being generically different, the purchaser was not bound to accept the goods. The ruling to this effect in the common pleas was unanimously affirmed in the exchequer chamber.

§ 561. Yet there is a strong line of cases in this country which hold that a purchaser, to whom an article has been sold

has paid for it, to recover the price as money had and received to his use," etc.

<sup>1</sup> Nichols v. Godts, 10 Ex. 191.

<sup>2</sup> And see, as sustaining the same distinction, Shepherd v. Kain, 5 B. & A. 240; Taylor v. Bullen, 5 Ex. 779; Allen v. Lake, 18 Q. B. 560; Wisler v.

Schilizzi, 17 C. B. 619; Hopkins v. Hitchcock, 14 C. B. N. S. 65; Mansfield v. Trigg, 113 Mass. 354; Whitney v. Boardman, 118 Mass. 247; Doane v. Dunham, 65 Ill. 512; cited Benj. on Sales, 3d Am. ed. §§ 600 *et seq.*

<sup>3</sup> Azémar v. Casella, L. R. 2 C. P. 431.

under a misdescription so essential as to amount to a condition precedent, can, by accepting the goods and waiving his right to throw up the contract, proceed against the vendor for breach of warranty. As we have already seen, the line between essential and non-essential representations is very shadowy, and there are many representations as to which, in this respect, great difference of opinion would exist. A bushel of peas, it is true, to take Lord Abinger's illustration, could not be held to be covered by a sale of a bushel of beans; yet while between different kinds of peas there may be, in reference to the purpose of the sale, as great a difference as between peas and beans, it would, without proof of the purpose, not ordinarily be a misdescription which avoids a sale for the article delivered to be of a different grade of pea from that described in the contract. Hence, in cases of this class, the purchaser, by accepting the goods, virtually says: "The true construction of this description is, that it does not go to the identity or the substance of the thing, but touches only quality. The misdescription is therefore a warranty of quality, and on this I bring suit."—It is in this sense that we are to understand the language of Shaw, C. J., as adopted by Judge Bennett, in a learned note to Mr. Benjamin's treatise: "There is no doubt that, in a contract of sale, words of description are held to constitute a warranty that the articles sold *are of the species and quality* so described."<sup>1</sup>

§ 562. Where goods are sold under a specific description, and the purchaser, after due opportunity of inspection and examination, retains the goods, he cannot, on account of obvious and patent variances in matters

<sup>1</sup> Shaw, C. J., *Hogins v. Plympton*, 11 Pick. 100; cited Benj. on Sales, 3d Am. ed. § 600, citing also *Beals v. Olmstead*, 24 Vt. 114; *Lamb v. Crafts*, 12 Met. 355; *Bradford v. Manly*, 13 Mass. 139; *Hastings v. Lovering*, 2 Pick. 214; *Morrill v. Wallace*, 9 N. H. 14; *Wolcott v. Mount*, 36 N. J. L. 262; 38 N. J. L. 496. It will be observed that in *Windsor v. Lombard*, 18 Pick. 60, there is the same cautious limitation of warranties to articles "of the *species, kind, and quality* thus expressed in the contract of sale," excluding generic misdescriptions, which preclude a contract from attaching. *Hawkins v. Pemberton*, 51 N. Y. 204; *Dounce v. Dow*, 64 N. Y. 411; *Borrekins v. Bevan*, 3 Rawle, 23; *Batturs v. Sellers*, 5 H. & John. 117; 6 H. & John. 249.



as to which there was no concealment or fraud, either claim to vacate the sale or sue for damages for false description.<sup>1</sup> In all matters of description, it is open to the parties to show by extrinsic proof that wrong words were used by mutual mistake.<sup>2</sup> When a party elects to hold goods erroneously described in the contract of sale, after he has become cognizant of the misdescription, this may be regarded as agreeing with the vendor to reform the contract so as to make it conform to the facts. At all events, the description cannot be regarded in such case as a condition precedent, non-compliance with which vacates the contract.<sup>3</sup> On the other hand, where there is an express warranty, the purchaser may fall back on the warranty as a collateral stipulation, not either expressly or by implication agreeing to reform the contract so as to make the description conform to the thing actually delivered.<sup>4</sup>

§ 563. A vendor may bind himself absolutely to deliver goods "on arrival" of a particular ship by a contract to that effect. Whether delivery is conditioned on the goods being on the ship, is to be determined by the construction of the particular contract. If I say that the goods "are now on passage" by a particular ship, and engage to deliver the goods on arrival of the ship, this is a warranty that the goods are on board, and makes me liable for the goods when the ship arrives.<sup>5</sup> And a contract to deliver goods "on arrival" of a particular ship is an absolute engagement to deliver the goods when the ship arrives, so that the vendor is liable in case of the goods not coming in the ship.<sup>6</sup> On the other hand, a vendor may avoid a warranty by using

tained, after due opportunity of inspection, purchaser cannot sue for obvious variance from description.

Describing goods as "to arrive," by a ship is making a condition precedent; describing them as on board a ship or selling them on arrival of ship, is an absolute warranty.

<sup>1</sup> *Supra*, §§ 224, 245.

<sup>2</sup> *Supra*, §§ 202 *et seq.*; Wh. on Evidence, §§ 1019, 1023.

<sup>3</sup> Benj. on Sales, 3d Am. ed. § 600, note; *Gibson v. Bingham*, 43 Vt. 41; *Gaylord Man. Co. v. Allen*, 53 N. Y. 515; *Dounce v. Dow*, 57 N. Y. 16; 64 N. Y. 411; *Morehouse v. Comstock*, 42 Wis. 626.

<sup>4</sup> *Wadley v. Davis*, 63 Barb. 500.

That extrinsic proof is admissible on question whether the variance between the description and the article delivered is material, see *Mitchell v. Newhall*, 15 M. & W. 308; *Lamert v. Heath*, 15 M. & W. 487.

<sup>5</sup> *Gorrissen v. Perrin*, 2 C. B. N. S. 681.

<sup>6</sup> *Hale v. Rawson*, 4 C. B. N. S. 85.

the terms "expected to arrive by," or even "to arrive by," or "on arrival by," a particular ship; and in such case the delivery will be dependent not only on the arrival of the ship, but on the arrival of the ship with the goods on board.<sup>1</sup> The vendor is not liable, on such a contract, where the goods intended to have been sold were not shipped, though others of a similar character, consigned to the same vendor, but sold to other parties, were on the same ship;<sup>2</sup> nor where goods of the same class were shipped, but consigned to another person;<sup>3</sup> nor where goods were on the ship, belonging to the same vendor, and unsold, but substantially different.<sup>4</sup>

Condition may on part performance become representa- § 564. As will hereafter be seen, a substantial though partial performance of a condition precedent followed by acceptance on the other side, transmutes the condition precedent into a representation, not

<sup>1</sup> *Boyd v. Siffkin*, 2 Camp. 326; *Idle v. Thornton*, 3 Camp. 274; *Lovatt v. Hamilton*, 5 M. & W. 639.

<sup>2</sup> *Smith v. Myers*, L. R. 5 Q. B. 429.

<sup>3</sup> *Gorissen v. Perrin*, 2 C. B. N. S. 681.

<sup>4</sup> *Vernede v. Weber*, 1 H. & N. 311. Mr. Benjamin (Benj. on Sales, 3d Am. ed. § 586) gives the following classification of the decisions on the distinction in the text: "First. Where the language is that goods are sold '*on arrival* per ship A. or ex ship A.', or '*to arrive* per ship A. or ex ship A.' (for these two expressions mean precisely the same thing), it imports a *double condition precedent*, viz., that the ship named shall arrive, and that the goods shall be on board on her arrival. Secondly. Where the language asserts the goods to be on board of the vessel named, as '1170 bales *now on passage*, and expected to arrive per ship A.', or other terms of like import, there is a *warranty* that the goods are on board, and a *single condition precedent*, to wit, the arrival of the vessel. Thirdly. The

condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him. Fourthly. Where the sale describes the expected cargo to be of a particular description, as '400 tons *Aracan Necrensie* rice,' and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain." As sustaining these conclusions are cited *Alewyn v. Pryor*, Ry. & M. 406; *Johnson v. Macdonald*, 9 M. & W. 600; *Simond v. Braddon*, 2 C. B. N. S. 324; *Gorissen v. Perrin*, 2 C. B. N. S. 681; *Hale v. Rawson*, 4 C. B. N. S. 83; *Vernede v. Weber*, 1 H. & N. 311; *Smith v. Myers*, L. R. 5 Q. B. 429; 7 Q. B. 139.

barring a suit on the contract, though leaving ground for a cross-action for damages.<sup>1</sup>

tion; and  
so of  
waiver.

§ 565. On a sale by sample it is a condition precedent to the perfecting the sale that the purchaser should have an opportunity of comparing the bulk with the sample.<sup>2</sup> Should the vendor refuse to allow this opportunity, this will justify the purchaser in throwing up the contract.<sup>3</sup>

On sample  
sale pur-  
chaser  
should  
have oppor-  
tunity of  
inspection.

§ 566. "The vendor," says Mr. Benjamin,<sup>4</sup> "who sells bills of exchange, notes, shares, certificates, and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it."<sup>5</sup> In this country, while the above rule has been frequently recognized, and the soundness of the English rulings has been unquestioned,<sup>6</sup> the distinction between covenants and warranties in this relation has not always been maintained, and there are rulings to the effect that the purchaser of invalid paper may pursue the vendor on an implied warranty that the paper is valid.

Sale of ne-  
gotiable  
paper im-  
plies gen-  
uineness.

## 2. Notice.

§ 567. When it is one of the terms of a contract that notice should be given as a condition precedent of indebtedness, then notice must be proved to have been given.<sup>7</sup> Thus where it was provided that the defendant should forward to the plaintiff one thousand barrels of flour at any time within six months upon

When re-  
quired by  
contract,  
notice  
should be  
given.

<sup>1</sup> *Infra*, §§ 604 *et seq.*; Benj. on Sales, 3d Am. ed. § 564.

<sup>2</sup> *Supra*, § 225.

<sup>3</sup> Benj. on Sales, 3d Am. ed. § 594; *Lorymer v. Smith*, 1 B. & C. 1.

<sup>4</sup> Sales, 3d Am. ed. § 607.

<sup>5</sup> To this are cited *Jones v. Ryde*, 5 Taunt. 488; *Young v. Cole*, 3 Bing. N. C. 724; *Westropp v. Solomon*, 8 C. B. 345; *Gompertz v. Bartlett*, 2 E. & B. 849; *Gurney v. Womasley*, 4 E. & B. 133. In *Young v. Cole*, Tindal, C. J.,

said: "it was not a question of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, is of no value."

<sup>6</sup> See *infra*, §§ 953 *et seq.*

<sup>7</sup> *Childe v. Horden*, 2 Bulstr. 144; *Baker v. Mair*, 12 Mass. 121; *Newcomb v. Brackett*, 16 Mass. 161; *Topping v. Root*, 5 Cow. 404; *Mansfield v. Beard*, 82 N. Y. 60.

six months' notice, it was held that the notice was a condition precedent of the delivery.<sup>1</sup>—The subject of notice of election in alternative contracts is hereafter distinctively considered.<sup>2</sup>

§ 568. We have already noticed cases in which the description "to arrive" in contracts for the sale of goods has been held to be a condition precedent.<sup>3</sup> We have next to consider contracts in which it is provided that the vendor shall give notice of the name of the ship on which the goods are expected as soon as the arrival becomes known to him. It has been held that he cannot enforce such contract without complying with this condition.<sup>4</sup>

§ 569. A marine insurer is supposed to have opportunities of knowing what occurs within the range of the insurance at least equal to the opportunities possessed by the insured; and hence it is not necessary, unless so stipulated, in order to fix the insurer with a loss, that he should be notified of the loss by the insured.<sup>5</sup> Notice of abandonment is only necessary when total loss cannot be proved, and when the object is to compel the insurer to take possession of the wreck.<sup>6</sup> In fire insurance the same reasoning does not apply. As a rule, a marine insurer has more opportunities to be informed of marine disasters than have the owners of particular vessels: as a rule, on the other hand, the owner of a particular house is more likely to be promptly and accurately informed of injury to it than would its insurer. It is for this reason that stipulations, that the insurer should be advised, either at once or within a stated period, of the burning of the insured premises, are almost universally introduced into policies of fire insurance; and when so introduced, notice being given in conformity with the limitation is a condition precedent to a claim on the policy.<sup>7</sup> And when not required in the policy, the relations

<sup>1</sup> Quarles v. George, 23 Pick. 400.

<sup>2</sup> *Infra*, § 621.

<sup>3</sup> *Supra*, § 563.

<sup>4</sup> Benj. on Sales, 3d Am. ed. § 588; Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Ex. 709; 11 Ex. 642.

<sup>6</sup> Dawson v. Wrench, 3 Ex. 359.

<sup>5</sup> Roux v. Salvador, 3 Bing. N. C. 266; Knight v. Faith, 15 Q. B. 649;

Potter v. Rankin, L. R. 5 C. P. 341.

See Smith v. Ins. Co., 7 Met. 448; Am. Ins. Co. v. Francia, 9 Barr. 390.

<sup>7</sup> Roper v. Lendon, 1 E. & E. 825.

of the parties are usually such as to make prompt notice a condition precedent.—The time limited in the policy may be a material part of the condition.<sup>1</sup>

§ 570. A party offering to act as guarantor must have reasonably prompt notice that his offer was accepted in order to bind him;<sup>2</sup> and such notice can be inferred from all the circumstances of the case.<sup>3</sup> This rule, however, is limited to those cases in which the offer of guaranty is a mere proposal. But, as is stated by Matthews, J., in a decision of the supreme court of the United States in 1881, "There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor. The former is the sense in which the rule is to be understood as having been applied in the decisions of this court.<sup>4</sup> The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between the parties. It was, in the case cited, the consideration for the promise of the guarantor. And wherever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the

Guarantors  
entitled to  
notice of  
acceptance.

<sup>1</sup> Leake, 2d ed. 647; Whyte v. Ass. 504; Morrow v. Waltz, 18 Penn. St. Co., cited in Moore v. Harris, L. R. 1 118.  
Ap. Ca. 330; see *infra*, § 887.

<sup>2</sup> Adams v. Jones, 12 Pet. 207.

<sup>3</sup> Mozley v. Tinkler, 1 C. M. & R. 692; Reynolds v. Douglass, 12 Pet. 10 How. 475; Wildes v. Savage, 1 Story, 22.

case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement." Hence it was held that a guaranty made at the guarantee's request is the answer of the guarantor to the guarantee's proposal, and no further notice is necessary; and the same rule applies when the agreement to accept is contemporaneous with the guaranty, and forms its consideration. It was also held that when a guaranty is expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, it is not an unaccepted proposal, requiring notice of acceptance to bind the guarantor, but without such notice becomes binding on delivery.<sup>1</sup> The question

<sup>1</sup> Davis v. Wells, S. C. U. S. 1881. See City National Bank v. Phelps, 86 N. Y. 484. See to the effect that when there is a consideration for the contract of guaranty no notice is necessary to the guarantor, Breed v. Hillhouse, 7 Conn. 523; Douglass v. Howland, 24 Wend. 35; Whitney v. Groot, 24 Wend. 82; Smith v. Dunn, 6 Hill, 543; Union Bank v. Coster, 3 N. Y. 203; Powers v. Bumeratz, 12 Oh. St. 273; Caton v. Shaw, 2 Har. & G. 13; Cooke v. Orne, 37 Ill. 186; Carman v. Elledge, 40 Iowa, 409; Case v. Howard, 41 Iowa, 479; Davis S. M. Co. v.

Jones, 61 Mo. 409. The law in reference to letters of credit has been already distinctively discussed, *supra*, § 25 a. As to guaranties in other relations, see *supra*, §§ 436, 515.

In Thompson v. Glover, 78 Ky. 193, Hines, J., delivering the opinion of the court, said: "It is well established that there must be an acceptance of the offer of guaranty, and a notice, express or implied, to the guarantor of such acceptance. The reason of this rule is that the guarantor may have an opportunity of arranging his relations with the party for whose

in such case is whether the contract of guaranty was completed between the guarantor and the guarantee. If it was, it is not necessary, as has been just seen, for any notice to be given to the guarantor in order to fix his liability; though it is otherwise where, from the structure of the agreement, or from other facts determining the relations of the parties, the guarantor's acceptance is dependent upon further notification.<sup>1</sup>

benefit or in whose favor the guaranty is given. The rule should not be pressed beyond this reason. When the whole of the transaction is connected, and of such a nature as to give the guarantor this information, no specific or formal notice is necessary."

In *Powers v. Bumcratz*, *ut supra*, the court said: "We have carefully examined the cases of *Oxley v. Young*, 2 H. Bl. 613, and *Peel v. Tatlock*, 1 Bos. & Pull. 419, and cannot see how the fairness and correctness of the comment upon them of Cowen, J., before quoted, can be denied or disputed. If there be English cases sustaining the doctrine of *Douglas v. Reynolds*, they have not been cited in the decisions of the courts of the United States. In several of the cases decided in the state courts English cases are cited. In *Craft v. Isham*, 13 Conn. 28, 39, which, though decided before *Douglas v. Howland*, had not been reported, and therefore is not referred to by Cowen, J., it is said, as to the decisions in *Douglas v. Reynolds*, and *Adams v. Jones*, that so far as being opposed to or unsupported by authorities, they are founded on principles which long since have been settled and are familiar in Westminster Hall. We barely refer to the authorities."

In *Wilcox v. Draper*, *ut supra*, after an elaborate survey of the authorities, Maxwell, C. J., said: "The question here involved is presented to this court for the first time. A desire to conform our rulings, where the authorities are conflicting, to those of the supreme

court of the United States, and thus secure uniformity of decision, inclines us to follow the cases decided by that court. But it is of much greater importance that decisions shall be based upon sound principles and correct law. The rule as to notice as to guaranty was unknown to the common law, yet it is sought to engraft it on our jurisprudence as a common law rule—to attach conditions to the contract of guaranty which are not applied to other contracts. When a proposition of guaranty of one party is accepted by the other, this makes a complete contract. The proposition is made to the person of whom the credit is desired, and he accepts it. Upon what principles of law can it be said that this proposition, which was intended to be accepted and take effect from that date, should not be binding on the guarantor without notice? The guarantor makes the person whom he vouches for and thinks worthy of credit so far his agent as to transmit the written guaranty by him, and is it not the business of the guarantor to inquire of him about what has been done under the guaranty? We therefore hold that a direct promise of guaranty requires no notice of acceptance." See further *infra*, § 710.

<sup>1</sup> *M'Iver v. Richardson*, 1 M. & S. 557; *Tuckerman v. French*, 7 Greenl. 115; *Mussey v. Rayner*, 22 Pick. 223; *Allen v. Pike*, 3 Cush. 238; *Fellows v. Prentiss*, 3 Denio, 512; *Emerson v. Graff*, 29 Penn. St. 358; *Kellogg v. Stockton*, 29 Penn. St. 460; *Cooke v.*

But on an ordinary letter of credit there should be a notice of acceptance given to the guarantor by the guarantee in all cases where the letter is a mere proposal.<sup>1</sup>—When a guaranty is limited to a single transaction, then a notice of such transaction by the guarantee to the guarantor is equivalent to a notice of the acceptance of the guaranty.—But when there is a continuing guaranty, it is necessary (in addition to the notice of acceptance, when that is requisite) that the guarantor should have reasonable notice of the amount of the credit given;<sup>2</sup> though it is otherwise when the guaranty goes to a liquidated contract, of which the guarantor has notice.<sup>3</sup>

§ 570 a. Unless the right is expressly reserved in the contract, a guarantor of a fixed liability is not entitled, And so as to notice of default. as a condition precedent to the maturing of his indebtedness, to notice of the default of the principal debtor,<sup>4</sup> though it is otherwise when notice is expressly stipulated.<sup>5</sup> The same distinction is *a fortiori* applicable to contracts for indemnity.<sup>6</sup> But by notifying A., who has agreed to indemnify B. from an impending claim, that the claim has been made, and by calling on A. to come in and defend, A. may be subsequently estopped from maintaining that the claim

Orne, 37 Ill. 186; Wilcox v. Draper, Sup. Ct. Neb. 1881, 25 A. L. J. 209; Shewell v. Knox, 1 Dev. L. 404; Lawton v. Maner, 9 Rich. L. 335; Claffin v. Briant, 58 Ga. 414; Rankin v. Childs, 9 Mo. 673; and cases cited *supra*, and citations in Brandt on Suretyship, § 157.

<sup>1</sup> Oates v. Weller, 13 Vt. 106; Kay v. Allen, 9 Barr, 320; Kellogg v. Stockton, 29 Penn. St. 460; Kincheloe v. Holmes, 7 B. Mon. 5; McCollum v. Cushing, 22 Ark. 540.

<sup>2</sup> Douglass v. Reynolds, 7 Pet. 113; Wildes v. Savage, 1 Story, 22; Howe v. Nickels, 22 Me. 175; Clark v. Remington, 11 Met. 361; Babcock v. Bryant, 12 Pick. 133; Thomas v. Davis, 14 Pick. 353; Montgomery v. Kellogg, 43 Miss. 486.

<sup>3</sup> See Protection Ins. Co. v. Davis, 5 Allen, 54; Bushnell v. Church, 15 Conn. 406; Kirby v. Studebaker, 15 Ind. 45.

<sup>4</sup> *Supra*, § 254; Leake, 2d ed. 646; Sicklemore v. Thistleton, 6 M. & S. 9; Lilley v. Hewitt, 11 Price, 494; Price v. Kirkham, 3 H. & C. 437; Walton v. Mascall, 13 M. & W. 452; Cooper v. Page, 27 Me. 73; Gibbs v. Cannon, 9 S. & R. 198; Leech v. Hill, 4 Watts, 448; Voltz v. Harris, 40 Ill. 155; Kline v. Raymond, 70 Ind. 271; Bowman v. Curd, 2 Bush, 565; Forest v. Stewart, 14 Oh. St. 246; see Brant on Suretyship, §§ 168 *et seq.*

<sup>5</sup> Lawrence v. Walmsley, 12 C. B. N. S. 799; Duncan v. Heller, 13 S. C. 94.

<sup>6</sup> Duffield v. Scott, 3 T. R. 374.



was not properly made or properly defended.<sup>1</sup>—A continuing guaranty, with fluctuating liabilities, stands on a different position with regard to notice, from a guaranty for a fixed sum. In the latter case notice of default need not be given, for the liabilities of all the parties are fixed; but it is otherwise with continuing liabilities which are subjected from the nature of things to uncertainty.<sup>2</sup>—And when a guarantor

<sup>1</sup> Leake, 2d ed. 646; Duffield v. Scott, 3 T. R. 374; Jones v. Williams, 7 M. & W. 493; Parker v. Lewis, L. R. 8 Ch. 1058.

<sup>2</sup> Thus in a case in 1881 in Iowa the action was on a bond executed by L. as principal and the other defendants as sureties, conditioned that L. should pay a corporation all his indebtedness to it, existing or afterwards to exist, whether upon notes, accounts, or in any manner, either party having the right to terminate the contract at pleasure. The bond was executed upon L. becoming agent of the corporation for the sale of sewing-machines. Beck, J., in giving the opinion of the court, said: "The controlling question in the case, and the only one argued by counsel, involves the correctness of the court's ruling in holding that defendants are not liable for the reason that notice was not given them of the extent of L's liability within a reasonable time after his agency was terminated, and his indebtedness fixed by his settlement with plaintiff. The ruling of the court, we think, is correct, and in accord with *Machine Co. v. Mills*, 55 Iowa, 543; S. C., 8 N. W. Rep. 356. We held in that case, 'where the guaranty is a continuing one, and the parties must have understood their liability thereunder would be increased and diminished from time to time, and the guaranty is uncertain as to when it will cease to be binding upon the guarantor, and when the party indemnified has the power at pleasure to annul and put

an end to the contract guarantied, without the knowledge of the guarantor, he is entitled to notice, within a reasonable time after the transactions guarantied are closed, of the amount of his liability thereunder.' It will be observed, upon considering the statement of the terms of the contract guarantied, that they are within this rule, and that under it the defendants in this case are not liable, in the absence of the notice contemplated therein. But counsel for plaintiff, in an ingenious argument, attempt to distinguish this case from *Machine Co. v. Mills*. They insist that while the contract in that case was a guaranty, in this case defendants are not guarantors, but are sureties for L., and are jointly liable with him upon an original contract. The error of this position is apparent. L. was or was about to become indebted to plaintiff upon the contract under which he was appointed agent. Defendants were not bound upon that contract. Neither were they bound upon the notes, accounts, acceptances, or upon any contract upon which L. became indebted to plaintiff. They became first and only bound upon the bond, whereby they guarantied that L. would pay his indebtedness to plaintiff in whatever form it assumed. A guarantor becomes bound for the performance of a prior or collateral contract upon which the principal is alone indebted. A surety is bound with the principal upon the contract under which the principal's indebtedness

would be prejudiced by want of notice of his principal's default, and the guarantee was advised of this default in time to give notice, then notice should be given of the fact, and of the intention to hold the guarantor responsible in all cases in which the liability of the guarantor is not direct, but is dependent on the default.<sup>1</sup> In case of a continuing guaranty of a servant, if the servant is guilty of dishonesty, and the master does not notify the fact to the guarantor, but retains the

arises. This is a familiar doctrine of the law. Upon applying it to the facts of the case, it will be seen that defendants are guarantors, and not sureties, for the performance of the contract upon which L.'s indebtedness to plaintiff arose. They were therefore entitled to notice, under the rule of *Machine Co. v. Mills*. It may be observed that guarantors are often called sureties. We use the term 'sureties,' in the foregoing discussion, to describe one who is bound by a contract with his principal—who joins with his principal in the execution of the contract, and becomes pecuniarily liable thereon. But, as we have seen, a guarantor—the surety in a contract of guaranty—is not primarily liable upon the principal's contracts, and only becomes liable upon his default. A guarantor, under this rule, is entitled to notice of the amount of his liability within a reasonable time after that liability is determined by the transaction between the original debtor and creditor." *Singer Mfg. Co. v. Littler*, 12 Rep. 777.

*Watertown Ins. Co. v. Simmons*, 131 Mass. 85, was an action upon the surety bond of an agent of an insurance company. The evidence showed that the agent rendered his accounts regularly until December, 1877, when he failed to pay the balance due the company, and that thereafter his indebtedness increased monthly until March, 1879, when he died, owing a balance larger than the bond. The

company did not give notice to the surety of the default until after this time, and the surety did not know of it. It was held that it was not the company's duty to notify the surety of the default within a reasonable time, and the failure to do so was not laches discharging the surety. There is no rule of law, so it was argued by Morton, J., giving the opinion, which makes it a duty which the creditor, under the circumstances of this case, owes to the surety either to dismiss its agent or to notify the surety of his default. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor. *Wright v. Simpson*, 6 Ves. 734; *Adams Bank v. Anthony*, 18 Pick. 238; *Taft v. Gifford*, 13 Metc. 187. The surety, it was held, is bound to inquire for himself, and cannot complain that the creditor does not notify him of the state of the accounts between him and his agent for whom the surety is liable. Mere inaction of the creditor will not discharge the surety, unless it amounts to fraud or concealment.

<sup>1</sup> *Louisville Co. v. Welsh*, 10 How. U. S. 461; *Wildes v. Savage*, 1 Story, 22; *Globe Bank v. Small*, 25 Me. 366; *Talbot v. Gay*, 18 Pick. 534; *Allen v. Rightmore*, 20 Johns. 366; *Douglass v. Howland*, 24 Wend. 35; *Farm. & Mech. Bk. v. Kerchavel*, 2 Mich. 504; *Cox v. Brown*, 6 Jones, L. 100.

servant, the guarantor is relieved.<sup>1</sup> But there must be negligence imputable to the guarantee, and consequent loss to the guarantor, in order to enable the latter to make want of notice a defence to a suit by the former.<sup>2</sup>—"A surety is not discharged from liability by the mere fact that the principal is continued in the master's employment after he has failed to make his payments promptly, of which fact the surety has not been advised."<sup>3</sup>

<sup>1</sup> *Phillips v. Foxall*, L. R. 7 Q. B. 660.

<sup>2</sup> *Douglass v. Reynolds*, 7 Pet. 114; *Clark v. Remington*, 11 Met. 361; *Craft v. Isham*, 13 Conn. 28.

<sup>3</sup> *Day, J., Home Ins. Co. v. Holway*, 55 Iowa, 578; *Jones v. U. S.*, 18 Wall. 662; *Albany Dutch Ch. v. Vedder*, 14 Wend. 166; *McKecknie v. Ward*, 58 N. Y. 541; *Atlantic Tel. Co. v. Barnes*, 64 N. Y. 385; *Pittsburgh R. R. v. Schaffer*, 59 Penn. St. 350.

In *Home Ins. Co. v. Holway*, 55 Iowa, 575, we have the following summary of the cases:—

"The case of *Roper v. Trustees of Sangamon Lodge*, 91 Ill. 518, is also directly in point, and much stronger in its facts, in favor of the sureties, than the case at bar. The point determined is correctly stated in the syllabus as follows: 'Where a party becomes surety upon the bond of a treasurer of a secret society, for the faithful application of moneys in his hands, payable to the society, the fact that the officers and members of the society knew of his previous misappropriation of the funds intrusted to him during the previous year, and with such knowledge re-elected him and failed to communicate such fact to his sureties, and they doing no act to put the sureties off their guard or prevent them from ascertaining the facts, no fraud can be imputed to the society which can be set up in avoidance of the sureties' liability on the bond.' See also *Ham v. Grove*, 34 Ind.

18; *Atlantic and Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385; *Cowley v. The People*, Illinois Supreme Court, in the Reporter of Nov. 10, 1880 [95 Ill. 249], page 592; *The Remington Sewing Machine Company v. Kezertee*, 5 N. W. Rep. 809 (Wis.) [49 Wis. 409]; *Atlas Bank v. Brownell*, 11 Am. Rep. 231; 9 R. I. 168.

"The cases relied upon by the appellee are nearly all distinguishable in principle from the case at bar. In *Sooy v. State*, 39 N. J. L. 135, it was held that 'A person taking a bond for the future good conduct of an agent already in his employment, must communicate to a surety his knowledge of the past criminal misconduct of such agent in the course of such employment, in order to make such bond binding.' No fact appears in the present case from which criminal misconduct on the part of Holway can be inferred. He made correct statements of the condition of his accounts to the plaintiff. It does not appear that he attempted to defraud them in any way. Upon the contrary, when he found himself running behind in his accounts, he made arrangements for the settlement of his delinquencies, and soon caused the plaintiff to be paid in full. He may have acted improperly and carelessly in the management of his principal's money, but his conduct is not shown by the evidence to be criminal. In *Phillips v. Fonall*, L. R. 7 Q. B. 666, it was held that 'on a continuing guaranty

## § 571. As between a debtor and a creditor, it may happen

for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and, instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.' In this case the surety guaranteed the honesty of a servant. The master detected the servant in acts of dishonesty, and took an agreement from the servant to pay a certain amount monthly on account of a defalcation which existed, which facts were unknown to the surety. It was for a defalcation subsequently occurring that it was sought to hold the surety liable. In *Franklin Bank v. Cooper*, 36 Me. 179, the bond was procured at the request of the bank, as surety for its cashier, who was then known to be a defaulter, and was made to cover past as well as future delinquencies, the bank having an opportunity to disclose the facts to the surety.

"*Dinsmore v. Tidball*, 34 Ohio St. 411, was an action upon a bond to indemnify the Adams Express Co. against loss from the dishonesty or unfaithfulness of an agent. The agent was at the time in the employment of the company, and had been guilty of acts of embezzlement, which fact was not communicated to the surety. The court say: 'Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound, under all circumstances, to communicate to the guarantor every fact within his knowledge which increases the risk, yet we think there can be no doubt, either upon principle

or authority, that when an agent has acted dishonestly in his employment, the principal, with a knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor.'

"In *Graves v. Lebanon National Bank*, 10 Bush, 23, when a cashier who had given no bond was guilty of embezzlement which might easily have been discovered, and the bank furnished a statement of its good condition, after which parties became sureties for the cashier, it was determined that they could not be held. In *Charlotte, Columbia, and Augusta Railroad v. Gaw*, 59 Ga. 685, it was held that 'the agent of a corporation, being under bond to account and pay over daily, cannot be trusted with more money at the sureties' risk after dishonesty of the agent has been discovered by the corporation, but he may be so trusted so long as the circumstances, fairly interpreted, point not to moral turpitude, but to a want of diligence or punctuality rather than to a want of integrity.'

"In all of these cases the agents were guilty of criminal misconduct or of positive dishonesty. In the last case it was expressly held that the agent may be trusted so long as the circumstances indicate a want of diligence or punctuality, and not a want of integrity. Under the facts disclosed in this case, the court, in our opinion, erred, both in giving the instructions complained of and in refusing those asked."

that the fact of the occurrence of an event on which the debt becomes payable, is one which would naturally come first to the knowledge of the creditor. In such case a stipulation that notice of the happening of the event should be given by the creditor to the debtor before the maturing of the debt is a matter of substance, and will be enforced as a condition precedent.<sup>1</sup> Even without such a stipulation, when a debt is made payable on an event whose occurrence is from the nature of things to be within the peculiar knowledge of the creditor, then notice of the event to the debtor is a condition precedent to the maturing of the debt. "The reason of the rule is that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary."<sup>2</sup>—It is otherwise when the occurrence of the event is not more distinctively in the knowledge of one party than of the other.<sup>3</sup> The true test is declared by

When debt is conditioned on event within creditor's peculiar knowledge, notice should be given to debtor.

<sup>1</sup> *Watson v. Walker*, 23 N. H. 471; *Lent v. Padelford*, 10 Mass. 230; *Tasker v. Bartlett*, 5 Cush. 359; *Clough v. Hoffman*, 5 Wend. 500; see *Benj. on Sales*, 3d Am. ed. § 577; *Webber v. Dunn*, 71 Me. 331.

<sup>2</sup> *Bramwell, B., Makin v. Watkinson*, L. R. 6 Ex. 25. To same effect see *Vyse v. Wakefield*, 6 M. & W. 453; but see *Hayden v. Bradley*, 6 Gray, 425.

<sup>3</sup> *Leake*, 2d ed. 644; citing 1 Wms. Saund. 117 a; *Watson v. Walker*, 23 N. H. 471. The following cases are given by Mr. Leake as illustrations of the rule in the text:—

"A buyer promised to pay for barley as much as the seller sold it for to any other man; the seller was held bound to give notice before he could call upon the buyer to pay, because the person to whom the barley would be sold was altogether at the option of the seller, who might sell it to whom he pleased. *Haule v. Homyng*, Cro. Jac. 432; cited

6 M. & W. 454. The defendant covenanted not to do anything whereby an insurance, to be effected on his life by the plaintiff at any office which the latter should choose, should be avoided or prejudiced; it was held that the defendant was not bound by this covenant until the plaintiff had given him notice that he had chosen an office, and had effected a policy, because the option of the plaintiff as to the office was too indefinite to enable the defendant to inform himself of the conditions of the policy he was to observe. *Vyse v. Wakefield*, 6 M. & W. 442; see also *Rippinghall v. Lloyd*, 5 B. & Ad. 742." Upon a covenant in a lease by the lessor to keep the demised premises in repair, it was held that notice of want of repair was a condition precedent without which he could not be sued for non-repair. *Makin v. Watkinson*, L. R. 6 Ex. 35; though see *Hayden v. Bradley*, 6 Gray, 425. In *Tasker v. Bartlett*, 5 Cush. 359, *Wilde, J.*, said it was a settled

Mr. Benjamin to be this: "that if the obligee has reserved any option to himself, by which he can control the event on which the duty of the obligor depends, then he must give notice of his own act before he can call upon the obligor to comply with his engagement."<sup>1</sup>

§ 572. It may be a question whether a condition is properly notified to the party whom it is sought to charge with it. This (as where conditions are set up by common carriers, and by vendors of goods at auction) depends on the facts of each particular case.

Notice of condition a question of fact.

If there be notice, and the condition is not illegal, the party affected is bound by it.<sup>2</sup> But the notice, if printed on a ticket, receipt, or bill of lading, must be put in such a shape as to impose the duty of reading it on the party taking the document.<sup>3</sup> Whether the party should have taken notice of such conditions is a question for the jury.<sup>4</sup> But when the conditions on a ticket or bill of lading are put in a shape which a business man ought to notice, then they will bind a party holding such ticket or bill of lading.<sup>5</sup>—As to notice the following positions may be advanced: Ignorance of the contents of a contract will not ordinarily relieve a party who has signed it when charged with notice of a condition that the contract recites.<sup>6</sup> And a condition inserted in a contract in such a way as would attract the attention of a person using due care binds, if not otherwise illegal, the party to the contract.<sup>7</sup> It is otherwise, however, as to conditions inserted on tickets or other papers in such a way as not to attract attention. And

rule that "where one party has knowledge of a material fact not known to the other party, he is bound to give notice."

<sup>1</sup> Sales, 2d ed. § 577, citing *Vyse v. Wakefield*, 6 M. & W. 442, *supra*.

<sup>2</sup> *Bywater v. Richardson*, 3 N. & M. 748; 1 Ad. & El. 508; *Head v. Tattersall*, L. R. 7 Ex. 7; *Hinchcliffe v. Barwick*, L. R. 5 Ex. D. 177. That assent must be definite to bind, see *supra*, § 22. That agreements to release carriers from the consequences of neg-

ligence are against the policy of the law, see *supra*, § 438.

<sup>3</sup> *Elmore v. Sands*, 54 N. Y. 512, and cases cited, *supra*, § 22.

<sup>4</sup> *Parker v. R. R.*, 1 C. P. D. 618.

<sup>5</sup> *Harris v. R. R.*, L. R. 1 Q. B. D. 515.

<sup>6</sup> *Supra*, § 196.

<sup>7</sup> *Supra*, § 22; *Wh. on Neg.* § 587; *Wh. on Ev.* § 1243; *Austin v. R. R.*, 16 Q. B. 600; *Behrens v. R. R.*, 6 H. & N. 366; *Bk. of Kentucky v. Adams Ex.*, 93 U. S. 174; *Squire v. R. R.*, 98 Mass. 239; *McMillen v. R. R.*, 16 Mich. 80.

this has been held to be the case with regard to conditions printed in small type in such a way that an ordinary observer would not notice them.<sup>1</sup>—An ordinary printed heading to a telegraph blank is a notice to a party sending a message on such blank, although the heading was never read by him.<sup>2</sup>

§ 573. By the law merchant, the drawer and indorsers of a bill of exchange, and the indorsers of a promissory note, are entitled to notice of dishonor of the paper by the party by whom it is primarily due.<sup>3</sup> Whether the paper is properly presented for payment, and whether the notice of dishonor is adequate, depends upon the law of the place of payment.<sup>4</sup> Notice, however, is not required in cases where the drawer or indorser, as the case may be, whom the object is to fix with the debt, is the party primarily liable, as where the acceptance was made for the drawer's accommodation.<sup>5</sup> Nor is it necessary that notice should be given to a surety, who, without becoming a party to the paper, by a collateral agreement, guarantees the payment of a bill, the guarantee binding him absolutely in default of payment.<sup>6</sup> Nor need notice be given to a party who is out of reach, so as to make notification impracticable.<sup>7</sup>

Drawer and indorser entitled to notice of dishonor.

<sup>1</sup> *Supra*, § 22; *Malone v. R. R.*, 12 Gray, 388; *Verner v. Sweitzer*, 32 Penn. St. 208; and cases cited Wh. on Neg. § 587.

<sup>2</sup> *Redpath v. Tel. Co.*, 112 Mass. 71; *Grinnell v. Tel. Co.*, 113 Mass. 279; *Breeze v. Tel. Co.*, 48 N. Y. 132. See, *contra*, *Sweatland v. Tel. Co.*, 27 Iowa, 433; and see *supra*, § 22.

<sup>3</sup> *Leake*, Am. ed. 645; *Byles on Bills*, 9th ed. 195. And this applies even to overdue notes. *Dwight v. Emerson*, 2 N. H. 159; *Adams v. Torbert*, 6 Ala. 865.

<sup>4</sup> Wh. Con. of L. § 454; *Rouquette v. Overmann*, L. R. 10 Q. B. 542.

<sup>5</sup> *Bickerdike v. Bollmann*, 1 T. R. 405; *Turner v. Samson*, L. R. 2 Q. B. D. 23.

<sup>6</sup> *Warrington v. Furber*, 8 East, 242; *Walton v. Mascall*, 13 M. & W. 452.

<sup>7</sup> *Bowes v. Howe*, 5 Taunt. 30. That notice may be waived, either directly or constructively, see *Amoskeag Bk. v. Moore*, 37 N. H. 539; *Gove v. Vining*, 7 Met. 212; *Ridgway v. Day*, 13 Penn. St. 208.

That while a waiver of demand is a waiver of notice, a waiver of notice does not operate as a waiver of demand, see 1 Pars. on Cont. 278, citing *Lane v. Steward*, 20 Me. 98; *Buchanan v. Marshall*, 22 Vt. 561; *Berkshire Bk. v. Jones*, 6 Mass. 324.

In *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 213 (1881), it was held that notice to an accommodation indorser (the defendant), who was such to the knowledge of the plaintiff, was not excused by the fact that the note was forged, which fact the defendant was not shown to know, and could

—The diligence to be used in giving notice is not perfect diligence, *i. e.*, the party is not chargeable with *culpa levissima* in

not be presumed to know. "It remains," said Danforth, J., "to consider the case of *Turnbull v. Bowyer* (40 N. Y. 456), cited by the appellant. There the names of persons to whom a check was payable were forged, and afterward it was innocently indorsed by the defendant. By his negligence it went into circulation, and reached the hands of one who, in good faith and without notice of the true relation of the indorser to the check, paid value for it, and was permitted to recover it back from him upon the ground that the indorsement was a warranty to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to such indorsement were genuine. It was decisive of that case that the payee's name was forged, and the remark that the implied warranty applied to the instrument itself was uncalled for by any fact in the case. In support of the proposition reference is also made to Story on Promissory Notes, §§ 135, 379, 380, 387, and cases there referred to, and such is the citation by the appellant. But these merely assert a right of action against the indorser on the ground that he cannot complain if called upon to repay money received by him upon an indorsement of a void title, for the author says, 'There is a failure of the consideration on which the transfer was made.' In *Daniels on Neg. Inst.* language similar to that of Story is made use of (§ 669), but the cases cited in its support do not meet the facts of this case. They are like those before referred to, and only upheld the recovery of money from the person to whom it was paid. (*Jones v. Ryde*, 5 Taunt. 486.) There are, no doubt,

cases in which an indorser is liable without notice of non-payment. *Bickerdike v. Bollman* (1 Term Rep. 405) is said by Parke, B., in *Carter v. Flower* (16 M. & W. 743) to have made the first exception to the general law which requires such notice. There the indorser knew the draft was not to be paid; and another is illustrated in *The Mechanics' Bank of N. Y. v. Griswold* (7 Wend. 165), where the indorser had all the maker's property. But that any exception should be allowed has been many times regretted, because thereby nice distinctions were introduced into the law, and a plain and intelligible rule departed from. It has, however, been uniformly held that, whoever will avail himself of an exception to the general rule, must bring his case within it, either by some recognized authority, or the application of some legal principle. Such exceptions should not be multiplied. *Turnbull v. Bowyer* (*supra*) goes no farther than to make an indorser liable upon an implied warranty, that a prior indorsement, purporting to be that of the payee, was genuine; and upon the same principle it has been held that a bank certifying a check in the usual form simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it. It does not warrant the genuineness of the body of the check as to payee or amount. This was decided in *The Marine National Bank v. The National City Bank* (59 N. Y. 67), where the plaintiff certified a check which had been altered, by changing the date, name of payee, and raising the amount, and subsequently paid it to the defendant. It was decided by this court that



respect to it;<sup>1</sup> but is the diligence that good business men of the particular class are accustomed to use under similar circumstances.<sup>2</sup>

§ 574. A lessor's covenant to repair is ordinarily conditioned on notice being given to him of the defects requiring repairing. It may be that certain repairs, from the nature of the building, have to be done at stated intervals, and as to these he will not require notice. But as the premises are not open to his continuous inspection, any damages by casualty, or even by ordinary wear and tear, so it has been held in England, must be notified to him in case it is desired to fix him with the duty of repairing;<sup>3</sup> though in this country this has been doubted as to matters concerning which the landlord ought himself to take notice.<sup>4</sup>

Lessor's covenant to repair is conditioned on notification.

### 3. *Request or demand.*

§ 575. Unless there is a specific stipulation that a debt shall not be due until a demand is made, a demand is not necessary to make the debt suable. "A request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request; but the debtor is bound to find out the

Ordinarily prior demand is not necessary to indebtedness.

the money so paid could be recovered back from the defendant who had received it.

"So the defendant in the case before us might be held responsible for the truth of facts presumed to be within his own knowledge, and for an implied affirmation that so far as he was connected with it the draft was not defective. It is not denied, however, that the signature of the drawer was genuine, nor that the person presenting the draft, and for whose consideration Pickering indorsed it, was the payee appearing upon its face at that time. The trial court does not find that the payee's name as indorser was forged; it finds no undertaking on the testator's

part, save that of an indorser; and we concur with the general term in the opinion that his liability was not established. There is no evidence of any intention to create any liability except as indorser. He had all the rights and privileges of one, was therefore subject only to the obligations which that relation imposed, and as he was not charged according to the law merchant, he cannot be held."

<sup>1</sup> Wh. on Neg. §§ 59 *et seq.*

<sup>2</sup> *Clark v. Bigelow*, 16 Me. 246; *Manchester Bk. v. Fellows*, 8 Foster, 312; *Bank of Utica v. Bender*, 21 Wend. 543.

<sup>3</sup> *Makin v. Watkinson*, L. R. 6 Ex. 25.

<sup>4</sup> *Haydon v. Bradley*, 6 Gray, 425.

creditor, and pay him the debt when due.”<sup>1</sup>—Even the insertion of the words “payable on demand” in a promissory note, does not make prior demand necessary to the institution of a suit,<sup>2</sup> though when a note is made payable at a particular place, it must be presented for payment at that place,<sup>3</sup> and where the note is payable in specific articles, the specific articles should be demanded.<sup>4</sup> And “when a party accepts a negotiable bill, he binds himself to pay the amount without notice to whomsoever may happen to be the holder, and on the precise day on which it becomes due.”<sup>5</sup> Even when a demand is required, it need not be in writing unless required by the contract,<sup>6</sup> nor need it be exact in amount unless this be needed to individuate the debt.<sup>7</sup>—A party who puts it out of his power to perform a contract may be sued without demand, even though the time specified for performance has not arrived.<sup>8</sup> This is eminently the case with regard to promises of marriage.<sup>9</sup> A party who shows by his conduct that he does not consider himself bound, cannot complain that marriage was not demanded by the other side.<sup>10</sup>

<sup>1</sup> Parke, B., in *Walton v. Mascall*, 13 M. & W. 458; adopted in *Leake*, 2d ed. 647. See *Wolf v. Marsh*, 54 Cal. 228; and see *infra*, § 881.

<sup>2</sup> *Norton v. Ellam*, 2 M. & W. 461; *Maltby v. Murrels*, 5 H. & N. 813; *Little v. Blunt*, 9 Pick. 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; *Wheeler v. Warner*, 47 N. Y. 519; *Fleming v. Potter*, 7 Watts, 380.

<sup>3</sup> *Leake*, 2d ed. 642; *Byles on Bills*, 9th ed. 205; *infra*, § 871.

<sup>4</sup> *Lobdell v. Hopkins*, 5 Cow. 518; *Vance v. Bloomer*, 20 Wend. 196; *Rice v. Churchill*, 2 Denio, 145.

<sup>5</sup> Parke, B., *Poole v. Tunbridge*, 2 M. & W. 225; see *Cotton v. Godwin*, 7 M. & W. 147; *City Bank v. Cutter*, 3 Pick. 414.

<sup>6</sup> *Colby v. Reed*, 99 U. S. 560.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Infra*, §§ 885 *a*; and see also *infra*, § 603.

<sup>9</sup> *Supra*, § 324; *infra*, § 606.

<sup>10</sup> *Wagenseller v. Simmers*, 97 Penn. St. 465. In this case *Mercur, J.*, said: “It was not necessary that he should say to her in express words, ‘I will not marry you,’ nor that she should run after him and say, ‘I entreat you to marry me.’ Marriage is a civil contract. A refusal to fulfil it may be as unmistakably manifested by conduct as by words. The true question was, whether the acts and conduct of the plaintiff in error evinced an intention to be no longer bound. This has been held a correct rule in case of an agreement of sale of personal property. *Freeth v. Burr*, L. R. 9 C. P. 208. We think this rule applies with greater reason to a marriage contract which should rest on mutual affection. His denial that he had ever promised to marry was very strong evidence of a refusal. Coupled with his acts it fully justified the jury in finding a refusal.” See *infra*, §§ 606, 885 *a*, 995.

§ 576. It may be that there are transactions between a bailor and bailee which, from the nature of things, must remain open until a demand is made by the bailor on the bailee. In such case the demand is a prerequisite to the inception of liquidated indebtedness. Thus, when goods are left with a bailee for safe custody, he is not chargeable with the duty of returning them until a demand is made on him; though it is otherwise when they have been converted by him wrongfully, in which case the bailment is determined, and he is at once chargeable as a wrong-doer.<sup>1</sup> Between a factor and his principal, also, the factor's duty is to account on demand; and until the demand is made, or there be instructions to remit, he is not liable to a suit for non-accounting.<sup>2</sup> And whenever demand is requisite, it must be given in reasonable time.<sup>3</sup> A demand, however, may be made at any place where the party holding the goods may be found.<sup>4</sup>—A pledgee of stock or other assets, where the debt in question is payable on demand, cannot sell without demand, even where it is agreed that he may sell without notice to the debtor.<sup>5</sup> And unless a clause is contained in the contract dispensing with notice, the pledgee must, before sale, give reasonable notice to the pledgor.<sup>6</sup>—That a demand, when requisite, under a contract of sale, should be made within a reasonable time, will be hereafter seen.<sup>7</sup>—A note payable in "legal services on demand" will not sustain an action until a demand, specifying the nature of the services required, has been made.<sup>8</sup>—When a demand is neces-

Demand necessary when implied in contract of bailment or other contract.

<sup>1</sup> *Wilkinson v. Verity*, L. R. 6 C. P. 206. See *Wren v. Kirton*, 11 Ves. 377; *Foster v. Bank*, 17 Mass. 479. Penn. *Coal Co. v. Blake*, 85 N. Y. 227. See 2 Kent's Com. 568; *Mason v. Briggs*, 16 Mass. 453.

<sup>2</sup> Wh. on Agency, § 787; *Topham v. Braddick*, 1 Taunt. 572; *Burns v. Pillsbury*, 17 N. H. 66; *Cooley v. Betts*, 24 Wend. 203. In Massachusetts, it has been said that in a claim against a foreign factor demand is not necessary. *Dodge v. Perkins*, 9 Pick. 368. See, *contra*, *Cooley v. Betts*, 24 Wend. 203.

<sup>3</sup> *Higgins v. Enimons*, 5 Conn. 76.

<sup>4</sup> *Dunlap v. Hunting*, 2 Denio, 643; *infra*, §§ 871 *et seq.*

<sup>5</sup> *Campbell v. Parker*, 9 Bosw. 322; *Wilson v. Little*, 1 Sandf. 351; S. C., 2 Comst. 443.

<sup>6</sup> *Tucker v. Wilson*, 1 P. Wms. 261; *Hart v. Ten Eyck*, 2 Johns. Ch. 100; *Stearns v. Marsh*, 4 Denio, 227.

<sup>7</sup> *Infra*, § 882 *a*.

<sup>8</sup> *Haskell v. Mathews*, 37 Me. 541.

sary, it is not excused by showing that the defendant would not probably have complied with it if made;<sup>1</sup> though it is otherwise where liability is generally denied.<sup>2</sup>—A demand is necessary in all cases where the creditor has an option which must be determined before suit is brought.<sup>3</sup>

§ 577. Where a bond binds the obligor to a specific duty in case he does not pay a designated amount on demand, that demand is necessary to constitute liability on the bond; though it is otherwise when the bond is merely conditioned for the payment of a specific sum without demand being required.<sup>4</sup> And when a warrant of attorney is given for the payment of money on demand, demand is necessary to enable the warrant of attorney to become operative.<sup>5</sup> And interest on a money bond, not specifying any day for payment, runs from the date of the bond.<sup>6</sup>

Bonds conditioned for payment on demand require demand.

<sup>1</sup> Southwick v. Bank, 84 N. Y. 421.

<sup>2</sup> Hammett v. Brown, 60 Ala. 498; *supra*, § 575; *infra*, § 885 a.

<sup>3</sup> Thus, in a Wisconsin case, in 1882 (Wheeler Man. Co. v. Teetzlaff, 53 Wis. 211), the plaintiffs were shown to have delivered to the defendant a sewing machine under a contract for the sale thereof, by which title was not to pass to the defendant until full payment was made in specific instalments, and on default of any payment the plaintiff was to be at liberty to take the machine away at his option. It was held that the plaintiff, on default in a payment, could not replevy the machine from the defendant's possession without demand or notice of his option, and refusal to surrender it, especially when it had been suffered to remain in defendant's possession for several months after the default, plaintiff claiming meanwhile that the payment was due. It was also held that in the absence of any

proof that the defendant was keeping out of the way to avoid notice and demand, a demand upon his wife, and her refusal to surrender the machine, and claim that it belonged to the defendant, were not a demand upon and refusal and claim by the defendant, unless she was especially authorized to act for him in that behalf, and the mere fact that she had made all the previous payments was not sufficient to establish such agency. In support of these views were cited Smith v. Newland, 9 Hun, 553; Johnston v. Whittemore, 27 Mich. 463; Giddey v. Altman, *id.* 209; Deyoe v. Jamison, 33 *id.* 94; Cushman v. Jewell, 7 Hun, 525-530; Hutchings v. Munger, 41 N. Y. 155-158.

<sup>4</sup> Leake, 2d ed. 642; Carter v. Ring, 3 Camp. 459; Gibbs v. Southam, 5 B. & Ad. 911.

<sup>5</sup> Nicholl v. Bromley, 2 B. & B. 464; Capper v. Dando, 2 A. & E. 458.

<sup>6</sup> *Infra*, § 881.

4. *Delivery or other action by promisee.*

§ 579. It may be, that by conditions of sale, express or implied, the delivery of the goods is to precede the payment of the price. If so, delivery is a condition precedent to the purchaser's liability on the contract, and no action can be maintained for the price before delivery.<sup>1</sup> Thus, where by the terms of sale fifty tons of iron were to be delivered "forthwith," while the price was to be paid within fourteen days, it was held that the delivery of the iron was a condition precedent to the paying of the price.<sup>2</sup> And where, by the terms of the contract, a condition must be complied with by one party before there can be performance by the other party, this condition is a condition precedent.<sup>3</sup>—The practice in case of rescission is hereafter considered.<sup>4</sup>—When delivery is divisible, performance may be partial, and there may be a *pro tanto* recovery.<sup>5</sup> It is otherwise when a delivery as an aggregate is contracted for.<sup>6</sup> Whether completion is a condition precedent depends on the construction of the contract.<sup>7</sup> In a case before the supreme court of the United States in 1880, it appeared that C. had contracted with the government for the removal of a rock in a particular harbor, the work to be finished at a specified time; and if he should be unable or unwilling to complete the work after beginning, the officer in charge was to terminate the engagement, and employ others to finish the work, deducting expenses from any money due C., who was to be responsible, for damages caused to others by his delay or laches. As the several sections of the work were in turn completed, he was to be paid *pro tanto*, reserving ten per cent. until the completion and acceptance of the whole work. The work was not completed within the specified limit, owing to the failure of a

When payment is conditioned on delivery or completion this is a condition precedent.

<sup>1</sup> Ripley v. Maclure, 4 Ex. 345. See Cush. 286. See Cooper v. Altimus, 62 Smoot's case, 15 Wall. 37; Bean v. Atwater, 4 Conn. 9; Morris v. Sliter, 1 Denio, 59. See *infra*, §§ 898 *et seq.* Penn. St. 486.

<sup>2</sup> Staunton v. Wood, 16 Q. B. 638.

<sup>4</sup> *Infra*, § 919.

<sup>5</sup> *Infra*, § 899.

<sup>6</sup> *Infra*, § 900.

<sup>3</sup> Mill Dam Foundry v. Hovey, 21 Pick. 439; Knight v. Worsted Co., 2

<sup>7</sup> *Supra*, §§ 554 *et seq.*; *infra*, § 900.

third party to deliver to C. the explosive compound requisite for the work. The officer in charge terminated the engagement, and there was no evidence to show that his action in this respect was wrongful. The work was completed by other parties at a less price. It was held that C. was entitled to recover the reserved ten per cent., but not the profits he would have made had he completed the work, nor the difference between the contract price and the price at which the work was done by others.<sup>1</sup>

§ 580. Suppose goods are to be sold and delivered by instalments at fixed periods; does default by the purchaser in accepting and settling for an instalment relieve the vendor from forwarding subsequent instalments?<sup>2</sup> and does default on the part of the vendor in sending the first instalment relieve the purchaser from his obligation in taking the other instalments? The last question was the first decided in England in the exchequer chamber, it being held that default in delivery of an early instalment entitled the purchaser to refuse subsequent instalments.<sup>3</sup> "The only question," said Pollock, C. B., "is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party."<sup>4</sup> In a subsequent case<sup>5</sup> in the queen's bench, it was held that default in accepting an instalment, when goods are sold to be delivered in successive instalments, does not discharge from the delivery of future instalments, but is ground only for a suit for damages. In 1881 the question came up before the court of appeal on the following facts:<sup>6</sup> The plaintiff contracted with the defendant for the purchase of 2000 tons of iron at 42s. per ton, free on board; delivery November, 1879, or equally over November, December, and January, at 6*d.* per ton extra. During November the defendant wrote to the plaintiff and his broker asking whether he

<sup>1</sup> *Quinn v. U. S.*, 99 U. S. 30.

<sup>5</sup> *Simpson v. Crippin*, L. R. 8 Q. B.

<sup>2</sup> See *supra*, § 330, as to partial impossibility, and *infra*, §§ 605, 716, 899.

14; see *Roper v. Johnson*, L. R. 8 C. P.

<sup>3</sup> *Hoare v. Rennie*, 5 H. & N. 19.

<sup>6</sup> *Honck v. Miller*, L. R. 7 Q. B. D. 92,

<sup>4</sup> See also remarks of Martin, B., in *Bradford v. Williams*, L. R. 7 Ex. 259.

would take the whole or one-third in November. The plaintiff's broker replied, first that the plaintiff had not decided, and afterwards, that the plaintiff would be obliged if none were delivered till December. The defendant then wrote (on the 1st Dec.) to plaintiff saying that the contract was cancelled. The action was for non-delivery of 666 $\frac{2}{3}$  tons of iron in Dec. 1879, and of 666 $\frac{2}{3}$  tons of iron in January, 1880. It was held by Bramwell, L. J., and Baggallay, L. J. (Brett, L. J., dissentiente, and reversing the judgment of Field, J., and Manisty, J., in the court below), that the refusal of the plaintiff to accept any portion of the iron in November entitled the defendant to rescind the entire contract.<sup>1</sup>—According to the judgment

<sup>1</sup> Bramwell, L. J., said: "The case of *Hoare v. Rennie*, 5 H. & N. 19, is in point. The same thing was decided a few days ago in *Engelhart v. Bosanquet* (not reported). It was there held that on a sale of 2000 tons of sugar, to come in two ships, when the first ship was not equal to contract, the buyer was not bound to take the other. But it is said that *Hoare v. Rennie* has been overruled by *Simpson v. Crippin*, *ubi supra*. That is not so. That decision was quite right. The case was distinguishable from *Hoare v. Rennie*, for the contract had been part performed, and could not, therefore, be undone. One may express a respectful agreement with what the learned judges said in *Simpson v. Crippin*, viz., that they did not understand *Hoare v. Rennie*. The other cases cited are distinguishable on the same ground. It has never yet been held that a man may break his contract, render the performance of the whole impossible, and though nothing has been done under it, insist on performance of the remainder. *Pordage v. Cole*, 1 Wm. Saund. 548, has absolutely nothing to do with the case. That was an action on a specialty. This is not. As to the argument that in a case like the present there are really three contracts for three parcels,

that is wholly erroneous. In parcel contracts the whole of what is to be done on one side is the consideration for the whole of what is to be done on the other."

"Were it not," said Baggallay, L. J., "for the authority of *Simpson v. Crippin*, *ubi supra*, which has been much pressed upon us, I should have felt no doubt as to the propriety of holding that the refusal by the plaintiff to accept the first portion of the cargo in accordance with the provisions or the contract as contrued by himself was a sufficient justification for the defendant's refusal to deliver the remaining portions. It is to my mind impossible to reconcile the decision in *Simpson v. Crippin* with that in *Hoare v. Rennie*, *ubi supra*, except in the manner pointed out by Bramwell, L. J., but I do not find that the decision in *Simpson v. Crippin* was in any way rested upon the distinction pointed out by the lord justice. Indeed, Mellor, J., stated in his judgment that he was unable to distinguish the two cases. If then the decision in *Simpson v. Crippin*, *ubi supra*, is to be considered as conflicting with that in *Hoare v. Rennie*, *ubi supra*, and I think that it was so considered by the judges who decided it, I am bound to say that I

of the majority of the court of appeal, therefore, if a contract provides for a sale of specified articles, in successive instalments, forming a continuous system, a failure in either party in respect to the first instalment vacates the contract as to the remainder. The point is thus strongly put by Bramwell, L. J.: "Suppose 10,000 tons of coal bought to be delivered at Gibraltar, Aden, and Bombay, in equal quantities—at Bombay in January, at Aden in February, and at Gibraltar in March, and no delivery at Bombay, could the buyer be made to take the other deliveries? Suppose a contract to supply bread to a workhouse for a year from the 1st January, and the contractor says he will supply, and does supply none in January, can he insist on supplying in the other eleven months? Suppose he does not supply for eleven months, can he insist on supplying in December? Would it make any difference if he was paid monthly? I hope not. I think not. Suppose a man orders a suit of clothes, the price being 7*l.*—4*l.* for the coat, 2*l.* for the trousers, 1*l.* for the waistcoat, can he be made to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first?"<sup>1</sup>—The question is dependent

adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided; the principles upon which each case was decided are so clearly expressed in the reported judgments that I need not refer to them in detail. I may mention that in the case of *Bradford v. Williams*, L. R. 7 Ex. 259, which was decided in the early part of the same year as *Simpson v. Crippin*, *Hoare v. Rennie* was quoted and recognized, and the principles upon which it was decided adopted. *Bradford v. Williams* was mentioned in argument in *Simpson v. Crippin*, but was not noticed in any of the judgments. The dissent of Brett, L. J., was on the ground that *Simpson v. Crippin* was in conflict with *Hoare v. Rennie*, and that between the two he preferred *Simpson v. Crippin*."

<sup>1</sup> In *Northington v. Wright*, U. S. Cir. Ct. Phila. 1882, 21 Am. Law Reg. 395, the contract was for 5000 tons of rails to be shipped "at the rate of about 1000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880." It was held that, on failure to deliver the stipulated amount in February, the purchaser might rescind, and refuse to accept further shipments. Butler, J., however, said that he regarded "the point as involved in serious doubt, not so much when considered on general principles, as when viewed in the light of modern decisions." McKennan, J., was more decided, holding that the weight of authority, even in England, was that such contract could be rescinded on failure of first delivery. In an elaborate note by Mr. L. S. Landreth, it is argued that the ruling of the court cannot be sus-



upon the construction of the contract. It is no doubt competent for me to say: "For the title to the property in question I will give you at once the price agreed on, though delivery need not be at once made." This is all that is ruled in principle in *Pordage v. Cole*<sup>1</sup> and the error in that famous and much-discussed case is, not in recognizing this principle, but in placing under the principle the facts then before the court.<sup>2</sup> It is also competent for the parties to say: "The

tained, and that in such case there can be no rescission. *Honck v. Miller*, L. R. 7 Q. B. D. 92, is admitted to rule to the contrary, but is held to be unreasonable, and against the tenor of authority. To the effect that, when deliveries are not interdependent, the contract is not rescinded by failure in an initial delivery, see further *Haines v. Tucker*, 50 N. H. 309; *Tyson v. Doe*, 15 Vt. 571; *Winchester v. Newton*, 2 Allen, 492; *Thompson v. Conover*, 3 Vroom, 466; *Morgan v. McKee*, 77 Penn. St. 228; *Lucesco Oil Co. v. Brewer*, 66 Penn. St. 351; *Kirkland v. Oates*, 25 Ala. 465; *Dunlap v. Petrie*, 35 Miss. 590; *McDaniels v. Whitney*, 38 Iowa, 60; *Sawyer v. R. R.*, 22 Wis. 403. The question in such cases is, Was the value to the purchaser of the later instalments dependent upon the due delivery to him of the prior instalments? If so, he ought not to be compelled to receive the later instalments, and is justified in refusing to accept them. See *Catlin v. Tobias*, 26 N. Y. 217; *Bradley v. King*, 44 Ill. 339; *Smith v. Lewis*, 40 Ind. 98. It is otherwise when the contract provides for a series of deliveries not mutually dependent. In such cases we have virtually separate contracts, on each of which there can be a separate suit. See *Dugan v. Anderson*, 36 Md. 567; *Loomis v. Bank*, 10 Oh. St. 327; *More v. Bonnet*, 40 Cal. 251; and other cases cited 21 Am. Law Reg. 406.

<sup>1</sup> 1 Saund. 319, decided in 1669, 20 & 21 Charles I.

<sup>2</sup> The plaintiff in that case agreed to sell land, and the defendant was to pay the plaintiff £775 for the land at an appointed time. The plaintiff, to adopt Judge Potter's summary in *King Philip Mills v. Slater*, 12 R. I. 82, "did not allege that he had ever conveyed or offered to convey the land, but sued the defendant for the money. To persons of ordinary intelligence it would seem that although the money was to be paid at a particular time, yet as it was stated and admitted that it was for the land, the purchaser should not be required to pay until he got the land; unless, which does not appear, the parties, when making the contract, knew it could not be conveyed by that time. Then the defendant would have contracted with his eyes open. But the learned court held that the plaintiff should have his judgment for the money, and the defendant should be left to sue for his damages for not conveying the land. In some cases of this sort, justice might be done under the law and practice of set-off, by letting both parties sue and retaining the cases until both could be decided. But this would be a very roundabout way of doing justice. The court seems in this case to have been influenced by the fact that the agreement was under seal. But justice requires that the intentions of the parties

goods are to be delivered by instalments, but the 'whole amount is to be paid at once.' But the ordinary meaning of a contract to deliver in instalments is not this. It is: "I want these goods in instalments; if they do not arrive each instalment in due time, it will defeat the object of the contract; if the supply does not come in at the proper moment, I must immediately look elsewhere, and consider your contract with me as abandoned." This is the meaning we would ordinarily attach, for instance, to a contract by which supplies are to be given to a manufacturer, at stated periods, to enable him to carry on his works, as, for instance, where coal is needed for a furnace, and without which the fires would be extinguished and irreparable loss incurred. That, if there be an agreement to this effect, it is to be carried out, and rescission permitted whenever there is a failure to pay an essential instalment, is plain; and it is also plain that whether such is the purport of a contract is to be determined from its terms, as explained by the circumstances under which they were made. And to this conclusion the cases in this country tend.<sup>1</sup>—In any view, where a default in payment of a

should control as much in that case as in any other case of contract. When in *Goodisson v. Nunn*, 4 Term Rep. 761, A. D. 1792, in an action on a contract similar to the foregoing, except that a time was expressed for making the deed, *Pordage v. Cole*, with 1 Rol. Abr. 415, pl. 8, and *Blackwell v. Nash*, 1 Str. 535, were cited for the plaintiff, Lord Kenyon, C. J., in giving his decision, said that the determinations in those cases outraged common sense. He considered the old cases overruled by the decision of Lord Mansfield in *Kingston v. Preston*, as given in *Jones v. Barkley*, Douglas, 689. And Buller, J., said if there had been no case in opposition to those old ones, he should not hesitate to make a precedent. And Gross, J., considered the later decisions as the most sensible. So in *Glazebrook v. Woodrow*, 8 Term Rep. 366, 371,

Gross, J., criticizes the tendency of the old cases to construe the covenants to be independent as 'contrary to the real sense of the parties and the true justice of the case.' See also the remarks of Lawrence, J."

<sup>1</sup> Phillips, etc., *Const. Co. v. Seymour*, 91 U. S. 646; *Dwinell v. Howard*, 30 Me. 258; *King Philip Mills v. Slater*, 12 R. I. 82; *Reybold v. Voorhees*, 30 Penn. St. 116; *Hartje v. Collins*, 46 Penn. St. 268; *Robson v. Bohn*, 27 Minn. 333. In *Van Buren v. Digges*, 11 How. U. S. 461, it was held that when payment is to be made by instalments, at fixed periods, the contractor, on payment not being made, may quit the work and sue for what has been done; and this though the contract provides that the work shall be prosecuted until completion.

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first instalment is made with the evident intention of repudiating the contract, or indicates incapacity to perform it

Chitty on Contracts, II. 923, we have the following note: "There may be rescission for the unperformed portions. And if I mistake not the effect of *Grant v. Johnson*, 1 Seld. 252; *Dox v. Dey*, 3 Wend. 361; *Bradley v. King*, 44 Ill. 339; they establish the sensible rule that where the subject is divided in quantities and times for delivery, and price; as each portion is performed or partially performed, and the partial performance is accepted, the doctrine of *Boone v. Ayre* applies as to so much as has been done, leaving the right of rescission as a remedy for the future performances, if they are capable of being severed, because of the defaults as to those parts as to which *Boone v. Ayre* applies. *Smith v. Lewis*, 40 Ind. 98, is distinct on the same point, unless it be that the permission to make deliveries at different times makes the difference." An instructive article on this topic by Mr. McMurtrie will be found in 15th Am. Law Rev. (Oct. 1881) 580; see, also, Solicitors' Journal, London, July 13, 1881, as given in 15th Am. Law Rev. 687.

In *King Philip Mills v. Slater*, 12 R. I. 82, which came before the supreme court of Rhode Island in 1877, the plaintiff, the King Philip Mills, on January 28, 1873, being about to go into operation, agreed with S. to sell to him the production of 400 looms up to July 1. The goods were to be made of specified weight, width, and quality, and to be delivered in lots of 1000 pieces; and payment was to be made thirty days after the delivery of each lot. The mill was expected to be in full operation by April 1, but deliveries were to be made earlier if possible, and the maximum production was to

be reached as soon as practicable, and to be maintained. About April 17, two lots, 1000 pieces each, were delivered, and were deficient in width and weight. The evidence showed that the plaintiff to fulfil the contract must procure new machinery. Upon learning this S. rescinded the contract. The plaintiff brought *assumpsit* against S. for goods subsequently and before July 1 manufactured, tendered, and refused.—It was ruled that the contract was for successive deliveries of goods as manufactured, and that the plaintiff having failed in the first deliveries could not compel S. to take goods subsequently manufactured and offered.

"It seems strange," said Potter, J., "that of the almost infinite variety and number of cases of contract coming before the courts, there should have been so few where the agreement was for successive deliveries at more or less definite periods; and that when they have occurred, the decisions should have been so conflicting. This conflict has arisen, partly, we think, from applying to this class of contracts, distinguished from all others by this marked peculiarity, principles of decision which properly belonged only to other classes of contracts.

"In cases of contracts for successive deliveries the doctrine of condition precedent becomes more difficult of application. So, also, when in such cases the articles already delivered have been used, it becomes impossible for the party rescinding to return them and put the other party *in statu quo*.

"In the progress of improvement in mechanics and the arts old systems of labor and of trade are changing, each branch of business becomes more and

and to pay for the goods to be delivered in future, the seller will be relieved from further delivery.<sup>1</sup> The insolvency of the purchaser, coupled with failure to pay for the first instalment, will relieve from the duty to deliver the remaining instalments.<sup>2</sup> But a mere temporary default in payment of the first instalment will not, when explained and corrected, relieve the vendor from his obligations as to other instalments, for which the purchaser is willing and ready to pay;<sup>3</sup> nor does an imperfection in performance which may be compensated for by a set-off, or by an action for damages.<sup>4</sup>—What has been said applies *a fortiori* to sales of perishable articles, deliverable day after day, and to be paid for at the end of each week. Upon a single failure to pay, the vendor has a right to rescind.<sup>5</sup>

§ 581. In executory agreements for the sale of goods, the vendor's obligation to deliver and purchaser's obligation to pay, are ordinarily concurrent,<sup>6</sup> and each constitutes a condition precedent, which cannot be enforced by either party without showing on his part performance, or offer to perform, or prevention by the other side coupled with readiness and willingness on his part to perform.<sup>7</sup> Thus in an English case

more subdivided, and, in consequence, every subdivision becomes more dependent upon others, and upon the strict and honest performance of the portion of the work they contribute towards the final product. And thus it is becoming more and more important, as this interdependence of different branches of trade increases, that contracts of this sort should be carried out according to their spirit and object, without regard to the mere technicalities, and we might well say quibbles, of the older decisions.”

To the same general effect are *Reybold v. Voorhees*, 30 Penn. St. 116, and *Shinn v. Bodine*, 60 Penn. St. 182; though see remarks of *Williams, J.*, *Lucesco Oil Co. v. Brewer*, 66 Penn. St. 351; *Morgan v. McKee*, 77 Penn. St. 229.

<sup>1</sup> *Bloomer v. Bernstein*, L. R. 9 C. P. 558; see *Withers v. Reynolds*, 2 B. & Ad. 882.

<sup>2</sup> *Infra*, §§ 603, 885 *a*, 901; *Chalmers ex parte*, L. R. 8 Ch. 289.

<sup>3</sup> *Freeth v. Burr*, L. R. 9 C. P. 208.

<sup>4</sup> *Scott v. Coal Co.*, 89 Penn. St. 231; see *infra*, §§ 899, 1009; and see as to remedy, *supra*, §§ 282 *et seq.*

<sup>5</sup> *Reybold v. Voorhees*, 30 Penn. St. 116.

<sup>6</sup> See *infra*, § 584.

<sup>7</sup> *Supra*, § 558; *Benj. on Sales*, 3d Am. ed. § 592; *Waterhouse v. Skinner*, 2 B. & P. 447; *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*, 6 M. & G. 942; *Warren v. Wheeler*, 21 Me. 484; *Jones v. Marsh*, 22 Vt. 144; *Lord v. Belknap*, 1 Cush. 279; *Smith v. Lewis*, 26 Conn. 118; *Gazley v. Price*, 16 Johns. 267; *Williams v. Healey*, 3

taken by Mr. Benjamin to illustrate this principle,<sup>1</sup> there was a mutual agreement for cross-sales, as follows: "Bought of A. & Co. about thirty packs of Cheviot fleeces, and agreed to take the undermentioned noils (coarse woollen cloths so-called); also agreed to draw for 250*l.* on account, at three months, 16 packs No. 5 noils, at 10½*d.*; 8 packs No. 4 noils, at 12*d.*" The defendant had bargained with the plaintiff for the purchase of the fleeces, and had agreed to sell him the noils. The noils having risen in price, the defendant refused to deliver them. The plaintiff, in his action, averred independent agreements, but he was nonsuited, all the judges holding that he should have alleged an offer to deliver the fleeces, which was a condition precedent to his right to claim the noils.—When land is sold, the conveyance of the title, and payment for it, are usually concurrent acts, one dependent on the other. There can therefore be no suit for the purchase money in such case, without a conveyance of title; there can be no suit for the land without a payment or tender of purchase money.<sup>2</sup> The vendor, it is true, on tendering conveyance, may sustain a bill for specific performance; or the purchaser may sustain a bill for specific performance on tendering the purchase money.<sup>3</sup> But at law, while either party may claim damages for the other's default, neither party can sue the other on his direct promise without proving that he has done his part; and hence if the purchaser refuses to take title, while liable to a suit for damages, or to a bill for specific performance, he is not liable at law on his promise to pay the purchase money.<sup>4</sup> It is otherwise, however, as we have seen, when the conveyance and the payment are not to be concurrent.<sup>5</sup>—It may be, for instance, that the payment is fixed on a particular day; while it is not

Denio, 363; *Campbell v. Gittings*, 19 Ohio, 347; *Hough v. Rawson*, 172 Ill. 588; *Cole v. Hester*, 9 Ired. 23; *Grandy v. McCleese*, 2 Jones, N. C. 142. As to mode of performance, see *infra*, § 869 *et seq.*; as to tender, see *infra*, §§ 970 *et seq.*

<sup>1</sup> *Atkinson v. Smith*, 14 M. & W. 695.

<sup>2</sup> *Supra*, § 558; *Leake*, 2d ed. 612; *Heard v. Wadham*, 1 East, 619; *Laird*

*v. Pim*, 7 M. & W. 474; *Manby v. Cremonini*, 6 Ex. 808; *Marsden v. Moore*, 4 H. & N. 500; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Smith v. R. R.*, 6 Allen, 262; *Phillips v. Soule*, 9 Gray, 233; *Williams v. Healey*, 3 Denio, 363; *Campbell v. Gittings*, 19 Ohio, 347.

<sup>3</sup> *Bispham's Eq.* §§ 370 *et seq.*

<sup>4</sup> *Laird v. Pim*, 7 M. & W. 474.

<sup>5</sup> *Supra*, §§ 545 *et seq.*

practicable, in consequence of the absence or temporary disability of one or more of the parties, to have the conveyance ready on that day. In such case the conveyance is not a condition precedent to the payment; and to enable the vendor to recover, all that is necessary is for him to show that he took all the steps obligatory on him towards tendering the conveyance.<sup>1</sup> And the rule, also, does not apply in those cases in which from the nature of the transaction delivery and payment are not concurrent duties.<sup>2</sup>

But payment may precede delivery.

§ 582. Where the time fixed for payment is to happen or may happen before the time fixed for performance, an action may be brought for the money (or other consideration) before the performance.<sup>3</sup>

Purchaser may take risk of delivery.

§ 583. Although a sale of goods is not to be perfected until delivery, and the risk of loss may not attach to the purchaser until delivery, yet if the parties stipulate that the goods are at the purchaser's risk from the time of the contract, this throws the burden of loss on the purchaser in case the goods are destroyed before the period of delivery has arrived.<sup>4</sup>

In cash sales of goods delivery and payment are concurrent.

§ 584. In an ordinary cash sale of goods, delivery of the goods by the vendor to the purchaser, and payment by the purchaser to the vendor, are supposed to be concurrent, the one conditioned on the other.<sup>5</sup> No formal tender from the one side to the other is necessary; it is enough for the vendor to be ready and willing to deliver, and the purchaser to be ready and willing to pay. If the sale is made on this basis, the contract is complete.<sup>6</sup> It may happen, however, that the goods are deliv-

<sup>1</sup> Leake, 2d ed. 682; *Pordage v. Cole*, 1 Wms. Saund. 319; *Dicker v. Jackson*, 6 C. B. 103. As to time of performance see fully *infra*, §§ 881 *et seq.*

<sup>2</sup> *Supra*, §§ 545 *et seq.*, *infra*, §§ 881 *et seq.*

<sup>3</sup> *Supra*, §§ 559 *et seq.*; *Peeters v. Opie*, 2 Saund. 350; *Irving v. King*, 4 C. & P. 309; *Pistor v. Cater*, 9 M. & W. 315; *Lord v. Belknap*, 1 Cush. 279;

*Robb v. Montgomery*, 20 Johns. 15; *Lowry v. Mehaffy*, 10 Watts, 387.

<sup>4</sup> Leake, 2d ed. 658; *Castle v. Playford*, L. R. 7 Ex. 98; *Martineau v. Kitching*, L. R. 7 Q. B. 436. See *supra*, § 317.

<sup>5</sup> *Supra*, § 558; *Morton v. Lamb*, 7 T. R. 128.

<sup>6</sup> Leake, 2d ed. 654; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; *Boyd v. Lett*, 1 C. B. 222.

ered without payment, with the express understanding that the title remains with the vendor until the price be paid. If so, the payment is a condition precedent to the vesting of the title in the purchaser.<sup>1</sup>

§ 585. A delivery of goods, also, by a person promising to furnish them in a state fit for the market, may be conditioned on receiving from the promisee the proper raw material. In this case the receiving the material is a condition precedent to the delivery of the goods.<sup>2</sup>—What has been said with regard to the delivery of goods applies, *mutatis mutandis*, to agreements for the finishing of a particular piece of work, the materials to be furnished by the other contracting party.<sup>3</sup>

A delivery of goods may be conditioned on supply of material.

§ 586. A lessee may bind himself to repair, providing certain things are first done by the lessor, in which case the condition must be satisfied before the lessee's liability attaches. This is the case when the lessee's engagement is made dependent upon the supervision by a surveyor to be appointed by the lessor;<sup>4</sup> or upon the lessor finding the timber, in which case, however, readiness and willingness to furnish the timber are sufficient without actual cutting until required;<sup>5</sup> or upon certain preliminary repairs being done by the lessor.<sup>6</sup> But a covenant by a tenant to repair, he being privileged to take from the

Covenants by lessee to repair may be made dependent upon prior acts of lessor.

<sup>1</sup> Smith v. Foster, 18 Vt. 182; Root v. Lord, 23 Vt. 568; Ayer v. Bartlett, 9 Pick. 156; Brewster v. Baker, 20 Barb. 364; Parris v. Roberts, 12 Ired. L. 268.

<sup>2</sup> Savage Man. Co. v. Armstrong, 19 Me. 147; Mill Dam Foundry v. Hovey, 21 Pick. 417; see Clement v. Clement, 8 N. H. 210; Downer v. Frizzle, 10 Vt. 541; See v. Partridge, 2 Duer, 463. Where a note was payable in goods, to be delivered to the creditor on a specific day, with the right reserved to the creditor to make a reasonable selection, and the creditor made no selection, but, before the time of payment, requested the debtor not to send any goods until ordered, it was held that the debtor was not by this discharged

from the contract, and that the creditor did not, by this request alone, lose his right of selection. Gilbert v. Danforth, 2 Selden, 585. In Robertson v. Amazon Tug Co., 45 L. T. N. S. 317, cited *supra*, § 212, it was held that where one party undertakes to perform certain services for the other party with the means to be provided by such other party, there is an implied warranty that such means are reasonably fit for the purpose for which they have been provided.

<sup>3</sup> Hall v. Rupley, 10 Barr, 231, cited *infra*, § 605.

<sup>4</sup> Coombe v. Greene, 11 M. & W. 480.

<sup>5</sup> Thomas v. Cadwallader, Willes, 496; Martyn v. Clue, 18 Q. B. 681.

<sup>6</sup> Neale v. Ratcliffe, 15 Q. B. 916.

estate whatever timber he required for the purpose, is held to be absolute, not dependent upon there being sufficient timber on the premises.<sup>1</sup>

§ 587. A promise, also, may be conditioned on the exercise of prudence and diligence on the part of the promisee. Illustrations of this are to be found in contracts of service which are conditioned on the good conduct of the employee, and in contracts of common carriage which are conditioned on the owner doing nothing to interfere with the due performance of the carrier's duties.<sup>2</sup>

Promise may be conditioned on prudence and diligence of promisee.

### 5. Discretion of promisor.

§ 588. A promise which is determinable at the will of the promisor is inoperative.<sup>3</sup> This has been held to be the case with a contract to take into service at wages to be fixed by the promisor, which is virtually a promise to make a promise.<sup>4</sup> It has been

Promise determinable at promisor's choice is invalid.

<sup>1</sup> Dean of Bristol *v.* Jones, 1 E. & E. 484.

<sup>2</sup> Wh. on Neg. §§ 334 *et seq.*

<sup>3</sup> Leake, 2d ed. 13, 637; Faulkner *v.* Lowe, 2 Ex. 595; Barnard *v.* Cushing, 4 Met. (Mass.) 230; see Demuth *v.* Institute, 75 N. Y. 502; cited *supra*, § 16.

<sup>4</sup> Leake, 2d ed. 636; Story on Cont. § 41; Roberts *v.* Smith, 4 H. & N. 315. Mr. Leake says (citing Taylor *v.* Brewer, 1 M. & S. 290; Roberts *v.* Smith, 4 H. & N. 315; Parker *v.* Ibbetson, 4 C. B. N. S. 346): "Where an employer engages a servant or agent upon the terms of making him such remuneration as he, the employer, shall think right, there is no legal liability to pay anything." On the other hand, in Bryant *v.* Flight, 5 M. & W. 114, the case on a *quantum meruit* was left to the jury; Parke, B., diss. In Butler *v.* Winona, Sup. Ct. Minn. 1881, it was held that in such case the agreement could be perfected by the

fixing of wages in good faith by the employer, and that this bound the employee. "It appears," said Clark, J., "from the findings of fact that the plaintiff performed services for the defendant corporation under a contract whereby 'it was agreed that plaintiff was to enter the service of the defendant in superintending the mason work of a mill, about to be erected by it, and the amount of the plaintiff's compensation, therefore, was to be left entirely to the defendant to determine and fix after the services were performed, at such price and amount as, under all the circumstances, it (defendant) should consider right and proper.' It further appears from the findings 'that after such services were completed, and before the action was brought, the defendant determined and fixed upon the sum of \$2.50 per day as the amount of plaintiff's compensation, and as the amount and price thereof, which, under the circumstances, it (defendant) con-



held that no legal liability is imposed by a stipulation to take whatever the promisor feels able to pay;<sup>1</sup> and by an agreement to build a house if the promisor chooses.<sup>2</sup> At the same time if there be a consideration for such a promise, and if it imposes any specific duty on the promisor, it may be enforced by a court of equity, and if broken, exposes the party making it to an action for damages.<sup>3</sup>—Under this head may be noticed the line of cases already discussed in which it is held that an inchoate negotiation which is not to take effect until reduced to form does not bind.<sup>4</sup> Hence, a court of equity will not enforce specific performance of an agreement “subject to a contract to be settled,” or “subject to a proper contract and the payment of a deposit to be agreed on.”<sup>5</sup>—The Roman standards are emphatic to the effect that a promise by a person to do a thing in the future at his own

sidered right and proper.’ The further fact is found that the services were reasonably worth four dollars per day. The court below gave judgment for the amount of the compensation at the rate of two and a half dollars per day. The plaintiff claims that he was entitled to a judgment at the rate of four dollars per day. We think the judgment, as rendered, is correct. The contract was clear and unambiguous. The stipulation that the amount of the compensation should depend upon the judgment and decision of the employer may have been an undesirable one for the plaintiff to consent to; but he, nevertheless, chose to accept the employment on those terms. The contract was an entirety and of obligation in all its parts, and the law cannot, after it has been executed, relieve the plaintiff from the consequences of one of its stipulations which proves to be disadvantageous to him. That would, in effect, be making a new contract for the parties. It was the duty of the defendant to determine and fix the amount of the compensation honestly

and in good faith, and if it did so fix it, the obligation of the contract was fulfilled so far as that matter is concerned. It is not alleged in the pleadings nor found in the decision that the defendant acted fraudulently or in bad faith, and fraud or bad faith is not to be presumed. The mere fact that the defendant fixed the compensation at an amount considerably less than the learned judge of the trial court found, upon the evidence before him, the services was reasonably worth, is not of itself sufficient to justify an inference of fraud or bad faith.”

<sup>1</sup> *Nelson v. Bonnhorst*, 29 Penn. St. 352.

<sup>2</sup> *Rosher v. Williams*, L. R. 20 Eq. 210; see *Harrison v. Guest*, 6 D. M. G. 424; *Ill. Deaf and Dumb Inst. v. Platt*, 5 Ill. Ap. 567.

<sup>3</sup> See *Graham v. Graham*, 34 Penn. St. 475; *Tell City Co. v. Nees*, 63 Ind. 245.

<sup>4</sup> *Supra*, § 5.

<sup>5</sup> *Harvey v. Barnard's-inn*, 45 L. T. N. S. 280.

election is inoperative.<sup>1</sup> “*Illam autem stipulationam, si volueris dari, inutilem esse constat.*”<sup>2</sup> “*Nulla promissio potest consistere, quæ ex voluntate promittentis statum capit.*”<sup>3</sup> “*Neque enim debet in arbitrium rei conferri, an sit adstrictus.*” As Windscheid<sup>4</sup> remarks, such a promise involves a contradiction: it is to be bound and not to be bound; to assume a duty and not to assume a duty. But a distinction is to be taken between cases where the condition is the promisor's future intention to do the particular thing, and cases in which the condition is his intention to do some other thing. For a man to say, “I will to do this thing when I will to do it,” is a mere play on words; for him to say, “I will to do this thing when at some future time I will to do some other thing,” makes a promise which can at least be understood.

§ 589. It may be that on the last distinction may be explained the rulings sustaining conditions in contracts for sale that the vendee shall “on trial” or “on approval” be satisfied with the thing delivered.<sup>5</sup> —A retention of the goods beyond the time allowed for trial, however, makes the sale absolute.<sup>6</sup>—The buyer has the entire time allotted for trial in which to change his mind and return the goods.<sup>7</sup> If the buyer unnecessarily consumes such a portion of the goods as materially impairs their value, this makes the sale absolute.<sup>8</sup>

§ 590. Contracts “of sale or return” differ from contracts of sale on trial in this, that the sale on trial calls for some sort of trial of the goods, and becomes absolute on expression

<sup>1</sup> L. 8, D. de O. et A. (44, 7); L. 108, § 1, D. de V. O. (45, 1); L. pr. D. de cont. emt. (18, 1); L. 13, C. eod. (4, 38); L. 46, § 3, cit.

<sup>2</sup> L. 108, § 1, cit.

<sup>3</sup> L. 7, pr. cit.

<sup>4</sup> § 93.

<sup>5</sup> Benj. on Sales, §§ 565, 595; Delamater v. Chappell, 48 Md. 244; McCormick v. Basal, 50 Iowa, 523; Hunt v. Wyman, 100 Mass. 198; Reed v. Upton, 10 Pick. 522; see McCarren v. McNulty, 7 Gray, 139; Atkins v. Barnstable, 97 Mass. 428; cases which go

too far in leaving the matter too much to the purchaser's caprice; see *supra*, § 16.

<sup>6</sup> Ibid.; Humphries v. Carvalho, 16 East, 45; Waters Heater Co. v. Mansfield, 48 Vt. 378; Dewey v. Erie, 14 Penn. St. 211; Spickler v. Marsh, 36 Md. 222; Prairie Farmer Co. v. Taylor, 69 Ill. 440.

<sup>7</sup> Ellis v. Mortimer, 1 B. & P. N. R. 257; Aiken v. Hyde, 99 Mass. 183.

<sup>8</sup> Elliott v. Thomas, 3 M. & W. 170; Lucy v. Mouffet, 5 H. & N. 229; see Smith v. Love, 64 N. C. 439.

of approval as well as on retention beyond the time fixed for trial; while contracts "of sale or return" do not make subjection to trial a condition, and consist of a mere proposal of sale, the retention of the goods beyond a reasonable time being an acceptance.<sup>1</sup> But a contract which provides for the delivery of the goods to the purchaser to be paid for in the future or returned if he cannot pay, constitutes a present sale.<sup>2</sup>—To agree to purchase if satisfied creates a condition precedent; to agree to return if not satisfied constitutes a condition subsequent. "An agreement to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."<sup>3</sup> And a return before the time limited is not made inoperative by the fact that the article returned has been intermediately injured by causes with which the purchaser has had nothing to do.<sup>4</sup> But in any case the return must be within the period limited, or the sale is absolute, and even a suit on the warranty is excluded.<sup>5</sup>

And so as to contracts "of sale or return."

§ 591. Further illustrations of the rule that a promise may be conditioned on the promisor's approval of certain extraneous acts or things are to be found in cases in which an offer of a reward is made to parties who come up to certain conditions determined by the promisor;<sup>6</sup> and in cases of offers to architects to make plans for a proposed building, such plans to be paid for if satisfactory.<sup>7</sup> In such case the duty of examination must not be exercised capriciously, but there must be a reasonable trial of the plans;<sup>8</sup> though it is competent for the parties to leave the question

Condition of approval must not be capriciously exercised

<sup>1</sup> *Moss v. Sweet*, 16 Q. B. 493; *Elphick v. Barnes*, L. R. 5 C. P. D. 321; *Perkins v. Douglass*, 20 Me. 317; *Ray v. Thompson*, 12 Cush. 281; *Schlesinger v. Stratton*, 9 R. I. 578; *Chamberlain v. Smith*, 44 Penn. St. 431.

<sup>2</sup> *Martin v. Adams*, 104 Mass. 262; *McKinney v. Bradlee*, 117 Mass. 321.

<sup>3</sup> *Wells, J., Hunt v. Wyman*, 100 Mass. 198.

<sup>4</sup> *Head v. Tattersall*, L. R. 7 Ex. 7.

<sup>5</sup> *Hinchcliffe v. Barwick*, L. R. 5 Ex. D. 177.

<sup>6</sup> *Supra*, § 24.

<sup>7</sup> *Moffatt v. Dickson*, 13 C. B. 543; 15 C. B. 583. As to plans to be submitted to architects, see *infra*, § 594.

<sup>8</sup> *Dallman v. King*, 4 Bing. N. C. 105; *Parsons v. Sexton*, 4 C. B. 899.

absolutely to the determination of the employer, in which case it will be sufficient if he exercises his option in good faith.<sup>1</sup>—Another illustration is to be found in the conditions, common in leases, prohibiting assignments unless with the lessor's assent. The lessor's right of rejection in such cases cannot be arbitrarily exercised. Hence, it has been held that a mere arbitrary and unreasonable refusal to assent to an assignment does not preclude such an assignment, though each limitation of this kind is to be determined by its special terms.<sup>2</sup>—Still more strongly is the fairness of such discretion insisted on when its exercise has in it anything of the judicial element. Thus, where, in an assignment for creditors, it is provided that debts shall be verified by such proof as the assignee shall require, it has been held obligatory on the assignee to subject the claims only to reasonable tests.<sup>3</sup> And a similar duty is imposed upon insurers by the clause in policies requiring that, before payment of an alleged loss, the insured must furnish to the insurers such proofs as they shall deem necessary to establish his claim.<sup>4</sup>

#### 6. *Action of third party.*

§ 593. A third party may be made the arbiter of the compliance with a condition.<sup>5</sup> Thus, an agreement to loan money on mortgage, provided the property to be mortgaged receives a certain valuation, is conditioned on the furnishing of such a valuation;<sup>6</sup> an agreement for the price of transportation to be fixed by the quartermaster is conditioned on the decision of the quartermaster;<sup>7</sup> an agreement to pay a price to be determined on measurement by a particular person is conditioned on

<sup>1</sup> *Andrews v. Belfield*, 2 C. B. N. S. 779; *Stadhard v. Lee*, 3 B. & S. 364; 2 Pars. on Cont. 59.

<sup>2</sup> *Treloar v. Bigge*, L. R. 9 Ex. 151; *Lehmann v. McArthur*, L. R. 3 Ch. 496.

<sup>3</sup> *Coles v. Turner*, L. R. 1 C. P. 373.

<sup>4</sup> *Braunstein v. Ins. Co.*, 1 B. & S. 782.

<sup>5</sup> *Benj. on Sales*, 3d Am. ed. § 574;

*Worsley v. Wood*, 6 T. R. 720; *Ames v. Vose*, 71 Me. 17; *Read v. Decker*, 67 N. Y. 182; *Nofsinger v. Ring*, 71 Mo. 149. As to approval of architect, see *infra*, § 594; of engineer, *Bean v. Miller*, 69 Mo. 384.

<sup>6</sup> *Leake*, 2d ed. 639; *Thurnell v. Balbirnie*, 2 M. & W. 786.

<sup>7</sup> *Kihlberg v. U. S.*, 97 U. S. 398.

measurement by such person;<sup>1</sup> and an agreement to pay insurance may be conditioned on a certificate being obtained as to the loss from a neighboring magistrate.<sup>2</sup> An agreement, also, for the sale of shares in a corporation may be made conditional on the approval of the sale by the directors, though this is dependent upon the charter of the company; and unless this power is given to the directors, their consent to a *bona fide* transfer of the stock will be compelled.<sup>3</sup>—When the agreement is to pay a price to be fixed by A., the price, when fixed, is as much part of the contract as it would have been if fixed by the parties themselves.<sup>4</sup> When, also, P., on leasing V.'s railroad, agrees to pay V.'s debts when duly adjusted and audited, there can be no suit on this agreement when V. refuses to make such an adjustment, even though the creditors of V. have obtained a judgment for their particular debts.<sup>5</sup>—If an agreement is made for a sale at a specific price, provided that if a third party decide in a particular way the price shall be higher, and the third party, without fault of the buyer, refuses to interfere, the property must be delivered at the price fixed in the agreement.<sup>6</sup> When the agreement, also, is

<sup>1</sup> *Mills v. Bayley*, 2 H. & C. 36. Where a condition in a sale of a horse was that "horses warranted . . . not answering the warranty, must be returned by 5 o'clock of the day after the sale; shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final;" it was held that a plaintiff who had neglected to return within the period limited, so that the arbitrament could be made, could not subsequently bring suit on the warranty. *Hincliffe v. Barwick*, L. R. 5 Ex. D. 177.

<sup>2</sup> See *Worsley v. Wood*, 6 T. R. 710; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 513; *Leadbetter v. Ins. Co.*, 13 Me. 265; *Turley v. Ins. Co.*, 25 Wend. 374.

<sup>3</sup> *Weston's case*, L. R. 4 Ch. 20.

<sup>4</sup> *Benj. on Sales*, 3d Am. ed. § 87; *Fuller v. Bean*, 34 N. H. 301; *Nutting v. Dickinson*, 8 Allen, 540; *McCandlish*

*v. Neuman*, 22 Penn. St. 460; *Cunningham v. Ashbrook*, 20 Mo. 553.

<sup>5</sup> *Bills v. R. R. Assoc.*, 7 Baxt. (Tenn.) 595.

<sup>6</sup> In *Bogden v. Marriott*, 2 Bing. N. C. 473, the doctrine in the text was pushed to its extremest limit. An agreement between A. and B. provided that A. should sell a horse to B. for one shilling, provided that if, to the satisfaction of C., the horse should trot eighteen miles in an hour, B. should pay the price of £200. C. refused to attend without any fault of the buyer. It was held that A. was obliged to deliver the horse to B. for one shilling; and *Tindal, C. J.*, said that this "was a condition which the defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite side."

to sell at a price to be fixed by A., and A. refuses to fix the price, without any fault of either party, then, as the fixing the price is a condition precedent of the sale, there is no sale.<sup>1</sup> If, in the case of a sale of real estate, the appraiser is ready to enter and make the appraisement, the court will order the vendor to allow him to enter and appraise, so that specific performance can be decreed.<sup>2</sup> When an appraiser refuses to act on a sale of goods whose price is to be fixed on his appraisement, this also is a condition precedent to a sale; though if the buyer obtain possession of and retain the goods after such non-appraisement, he may become liable on an implied contract for their value.<sup>3</sup>—If the contract is to be performed to the satisfaction of another, the decision of such person, if honest, is final, no matter how unreasonable.<sup>4</sup> If, however, there is collusion, this entitles party defrauded to rescind.<sup>5</sup> Thus, in a recent English case,<sup>6</sup> the evidence was that the defendants agreed with the plaintiffs to lay a cable, the payment to be in part on the beginning of the work, and in part in twelve instalments, payable on certificates by the plaintiffs' engineer. The engineer, who was employed to lay other cables for the defendants, agreed with them to lay this cable also for a price to be paid him by them. It was held that this agreement was a fraud, entitling the plaintiffs to have their contract rescinded, and to have the money they had paid under it returned.

§ 594. Building contracts often contain the provision that the owner shall not be liable to the builder until the work has been approved by the architect employed; and this provision, when the builder takes the work subject to it, and when the architect acts as an independent arbiter between the parties, will

Building contracts may be made dependent on approval of architect.

<sup>1</sup> Leake, 2d ed. 640; *Emery v. Wase*, 8 Ves. 505; *Milnes v. Gery*, 14 Ves. 400; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Firth v. R. R.*, L. R. 20 Eq. 100. See *Anderson v. Wallace*, 3 Cl. & F. 26.

<sup>2</sup> *Smith v. Peters*, L. R. 20 Eq. 511.

<sup>3</sup> Leake, 2d ed. 640; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Clarke v. Westrope*, 18 C. B. 765. See *Fuller v.*

*Bean*, 34 N. H. 304; *Borden v. Borden*, 5 Mass. 67.

<sup>4</sup> *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Gray v. R. R.*, 11 Hun, 70; *Gibson v. Cranage*, 39 Mich. 49; and cases cited *infra*, § 594.

<sup>5</sup> *Infra*, § 594.

<sup>6</sup> *Panama Tel. Co. v. India Rubber Co.*, L. R. 10 Ch. 515.

be strictly enforced. The owner has no right to complain, since the architect was selected by him, and charged by him with this very power; the builder has no right to complain, since he took the work on this very condition. No matter how arbitrary may be the action of the architect in refusing to give the certificate required by the contract, yet, if he persists in his refusal, the builder cannot recover on the contract price.<sup>1</sup> It is otherwise when the architect in collusion with the owner refuses to give the certificate, in which case the owner and the architect may together be liable in an action for conspiracy, or the owner may be made liable on the contract being estopped by his own fraud from setting up the refusal of the architect to certify.<sup>2</sup> The converse is also true: a settlement made by the architect collusively with the builder will not bind the owner.<sup>3</sup>—When performance of the archi-

<sup>1</sup> Leake, 2d ed. 640; Benj. on Sales, 3d Am. ed. § 575; Morgan v. Birnie, 9 Bing. 672; Grafton v. R. R., 8 Ex. 699; Clarke v. Watson, 18 C. B. N. S. 278; Goodyear v. Weymouth, 1 H. & R. 67; 35 L. J. C. P. 12; Ferguson v. Galt, 23 Up. Can. C. P. 66; Schenke v. Rowell, 7 Daly, 286; Smith v. Briggs, 3 Denio, 73; Whiteman v. Mayor, 21 Hun, 117; North Lebanon R. R. v. McGrann, 33 Penn. St. 530; Reynolds v. Caldwell, 51 Penn. St. 298; O'Reilly v. Kerns, 52 Penn. St. 214; Condon v. R. R., 14 Grat. 302; Lull v. Korf, 84 Ill. 225; Bean v. Miller, 69 Mo. 384.

<sup>2</sup> Batterbury v. Vyse, 2 H. & C. 42; Ludbrook v. Barrett, 46 L. J. C. P. 798, cited Leake, 2d ed. Add. xcv.; Hudson v. McCartney, 33 Wis. 331; Sullivan v. Byrne, 10 S. C. 122. As to collusion, see Panama Tel. Co. v. India Rubber Co., L. R. 10 Ch. 515, cited *supra*, § 593; and see *supra*, § 279. In Hudson v. McCartney, 33 Wis. 331, Dixon, C. J., said: "If fraud in the arbiter can ever be established by proof that he refused to certify the execution of the work when the same had been duly and properly performed,

it can only be in those cases where the refusal is shown to have been grossly and palpably perverse, oppressive, and unjust, so much so that the inference of bad faith and dishonesty would at once arise when the facts are known."

<sup>3</sup> *Supra*, § 279. In Tetz v. Butterfield, S. C. Wisc. 1882, 4 Wisc. Leg. News, 197, Taylor, J., giving the opinion of the court, said: "The evidence offered by the defendant in this case, if given, would have tended to prove such a state of facts as would at least have justified an inference of bad faith on the part of the architect in accepting the work. Knowingly accepting unsound and rotten materials where the contract called for sound materials would certainly tend to prove bad faith, and if the evidence had shown that he had permitted large quantities of such material to be used, when the contract called for sound and perfect materials, it would be almost conclusive evidence of that fact. Proof that a few pieces of imperfect material had been used, or that in some slight matters the workmanship had not been in strict accordance with the terms of the

tect's duties is made impossible by the vendee, this avoids the contract.<sup>1</sup>—The general rule above stated obtains in equity as well as in law.<sup>2</sup> A builder, also, who undertakes to finish certain work ordered by an architect by a specific time, cannot, after undertaking the work, dispute the feasibility of performance within the time, and is liable for the delay.<sup>3</sup> When, also, it is provided by the contract that the owner's liability should cease upon a default by the builder determined by the architect, the architect's decision on the question of default binds the builder.<sup>4</sup> Even a forfeiture of what is due on prior work may be thus determined, so that the architect's decision imposing such forfeiture is final.<sup>5</sup>—The certificate must be exact and conform to the condition.<sup>6</sup>—The principal is not bound by the architect's decision in a matter not within the architect's range of authority. Thus, in a case in Connecticut in 1880,<sup>7</sup> B. made a written contract to furnish materials and build a house for C., according to definite plans and specifications, for a fixed sum of money. All materials and work were to be accepted by a certain architect, who was to superintend the construction. B., under directions of the architect, did extra work. It was held that the direction and approval of such work was beyond the scope of the architect's agency, and that, therefore, C. was not liable thereupon.<sup>8</sup>

contract and specifications, would not be sufficient to avoid the acceptance of the work by the architect, nor establish bad faith on his part; but it seems to us, if the defendant had proved all the matters set out in his answer to their full extent, it would have shown such a want of faithfulness on the part of the architect as should render his acts ineffectual to bind the defendant."

<sup>1</sup> *Clarke v. Westrope*, 18 C. B. 765; see *supra*, § 312; *infra*, § 603.

<sup>2</sup> *Scott v. Liverpool*, 3 D. & J. 334; *De Worms v. Mellier*, L. R. 16 Eq. 554; *M'Intosh v. R. R.*, 2 Mac. & G. 74.

<sup>3</sup> *Jones v. St. John's Coll.*, L. R. 6 Q. B. 115.

<sup>4</sup> *Roberts v. Bury*, L. R. 5 C. P. 310; *Wadsworth v. Smith*, L. R. 6 Q. B. 332.

<sup>5</sup> *Faunce v. Burke*, 16 Penn. St. 469. That an architect's certificate can be by parol, see *Roberts v. Watkins*, 14 C. B. N. S. 592; though it is otherwise when the contract requires the certificate to be in writing. *Lamprell v. Billericay Union*, 3 Ex. 283; *Russell v. Bandeira*, 13 C. B. N. S. 149. When the written order by the engineer is made an essential to a recovery for extra work, the mere approval by the engineer without such order will not sustain a recovery. *Tharsis Co. v. McElroy*, L. R. 3 App. Ca. 1040.

<sup>6</sup> *Smith v. Briggs*, 3 Denio, 73.

<sup>7</sup> *Starkweather v. Goodman*, 48 Conn. 101.

<sup>8</sup> See to same effect, *Downey v. O'Donnell*, 86 Ill. 49.



And where a third party is made arbiter, his decision must be conformed to. Thus, on a contract to guarantee the payment of a certain sum in consideration of the building of a county bridge at a place to be determined by viewers, there can be no recovery if the location determined by the viewers is changed.<sup>1</sup>—As has been already seen, if the arbiter, in collusion with one party, decides improperly in favor of the other, this does not bind the former.<sup>2</sup>

§ 595. A subscription to a charity or other public undertaking may be conditioned on a certain amount being elsewhere subscribed; and if the condition be not complied with, the subscription is void.<sup>3</sup> On the other hand, when such subscriptions are made without such condition, each one on the faith of the other, each subscriber is estopped so far as concerns other *bona fide* subscribers who have paid in from denying the binding effect of his subscription.<sup>4</sup> But unless the condition on which the subscription is dependent is fulfilled, it is not due.<sup>5</sup>

Subscriptions may be conditioned on action of third parties.

§ 596. We have already seen that the refusal of a third party to do an act the defendant guaranteed he should do is no defence to an action against the defendant on the guaranty.<sup>6</sup> The same rule applies to a contract that a third person shall do or abstain from doing a particular thing. The promisor, it is settled, becomes absolutely bound on such a promise on the happening of the condition.<sup>7</sup>

Refusal of third party no defence to guaranty.

### 7. *Contingent future event.*

§ 597. Although, unless so limited by the contract, the performance of a promise will not be regarded as conditioned by

<sup>1</sup> Mercer Co. v. Coovert, 6 W. & S. 70.

<sup>2</sup> Tetz v. Butterfield, S. C. Wisc. 1881, 4 Wisc. Leg. News, 197, cited *supra*, and other cases above cited.

<sup>3</sup> *Supra*, §§ 16 a, 528; New York Exc. Co. v. De Wolf, 31 N. Y. 273.

<sup>4</sup> Wh. on Ev. § 1068; Gilmore v. Veazie, 24 Me. 202; Brigham v. Mead,

10 Allen, 245; Mann v. Cook, 20 Conn. 178; Garrett v. R. R., 78 Penn. St. 465; Smith v. Tallahassee, 30 Ala. 650; see for other distinctions, *supra*, § 528.

<sup>5</sup> *Supra*, § 528.

<sup>6</sup> *Supra*, § 321.

<sup>7</sup> *Supra*, §§ 311, 545 *et seq.*

an act to be done by the promisee when not necessary to such performance, yet it is competent for the parties to make a collateral matter a condition precedent. If they so declare, their intention will be carried out by the court, unless the object be to cover an illegal wager.<sup>1</sup> “Parties may think some matter, apparently of very little importance, essential, and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital and may be compensated for in damages, and if they sufficiently express such an intention it will not be a condition precedent.”<sup>2</sup>—Whether the creditor having peculiar knowledge of the occurrence of the contingency is bound to notify the debtor has been already discussed.<sup>3</sup>

§ 598. When there is a promise to pay out of a particular fund, the promisee is restricted to the fund thus specified, and has no remedy if such fund did not come into the promisor’s power, supposing its non-reception is not imputable to the promisor’s negligence.<sup>4</sup> A promise, also, by a corporation to pay out of funds to be contributed to it from specific parties, is conditioned on the reception of such funds by the corporation.<sup>5</sup> Whether a promise is to be so restricted depends upon the terms.<sup>6</sup>

§ 599. It is not inconsistent with the requisites of a bill of exchange that its acceptance should be conditioned on a future contingency; and a holder who takes it

<sup>1</sup> *Supra*, § 449.

<sup>2</sup> *Per cur.* in *Beltini v. Gye*, L. R. 1 Q. B. D. 183; and see *Stavers v. Curling*, 3 Bing. N. C. 369; *Lambert v. Fuller*, 88 Ill. 260; *Green v. Birch*, 2 Ill. Ap. 528. For promises conditioned on arrival of ships at a certain time, or a cargo being in a certain condition, see *Boyd v. Seffkin*, 2 Camp. 327; *Ellis v. Mortimer*, 1 B. & P. 257; *Lovatt v. Hamilton*, 5 M. & W. 639;

*Shields v. Pattee*, 2 Sandf. 262; 4 Coust. 122.

<sup>3</sup> *Supra*, § 571.

<sup>4</sup> *Chambers v. Jaynes*, 4 Barr, 39; *Snell v. Cheney*, 88 Ill. 258.

<sup>5</sup> *Sunderland Ins. Co. v. Kearney*, 16 Q. B. 925; *Williams v. Hathaway*, L. R. 6 C. D. 544; see *Furnwall v. Coombes*, 5 M. & Gr. 736.

<sup>6</sup> *Scott v. Ebury*, L. R. 2 C. P. 255.

subject to such a condition is bound by the condition.<sup>1</sup> Thus an acceptance may be made payable “when a navy bill is paid,”<sup>2</sup> or when a cargo arrives.<sup>3</sup>

be accepted  
or indorsed  
condition-  
ally.

The same may be predicated of negotiable paper payable in specific goods. When, however, the engagement is to pay a certain sum in specific articles at a given price, it has been held this gives an election to pay either the money or the articles;<sup>4</sup> though it is otherwise if the meaning to be collected from the entire writing is that goods are to be specifically delivered.<sup>5</sup> An indorsement, also, may be conditional.<sup>6</sup> But a bill of exchange must, to be negotiable as such, be payable absolutely at a specified date. If it be conditioned on a future contingent event, it is not negotiable, and the holder must sue upon it as on an ordinary contract, proving consideration.<sup>7</sup> And a note payable in a particular kind of money is not negotiable.<sup>8</sup> This is the case, also, with an order drawn by a consignor to his consignee to pay a fixed sum when in funds from a consignment.<sup>9</sup>

§ 600. A carrier or other bailee may excuse himself from special liability on the occurrence of any event which would otherwise not affect his liability. He may say, for instance, “I am bound to deliver these goods unless destroyed by fire.” This is the reverse of an insurer’s duties who agrees to pay the price of the goods in case they are destroyed by fire. The *casus* of accidental fire is then the condition, in the one case of the vacating, in the other of the institution, of the obligation.<sup>10</sup> It is also settled

*Casus* may  
vacate or  
institute  
obligation.

<sup>1</sup> Leake, 2d ed. 634; Byles on Bills, 9th ed. 148; Chitty on Bills, 10th ed. 9th ed. 186; but see, *contra*, Syracuse Bank v. Armstrong, 25 Minn. 530.

<sup>2</sup> Pierson v. Dunlop, Cowp. 571.

<sup>3</sup> Miln v. Prest, 4 Camp. 393.

<sup>4</sup> Perry v. Smith, 22 Vt. 301; Brooks v. Hubbard, 2 Conn. 58; Pinney v. Gleason, 5 Wend. 393; 5 Cow. 152. As to notes in the alternative, see *infra*, § 619.

<sup>5</sup> Edgar v. Boies, 11 S. & R. 445; Cole v. Ross, 9 B. Mon. 393; Harris Man. Co. v. Marsh, 49 Iowa, 11.

<sup>6</sup> Leake, 2d ed. 636; Byles on Bills,

<sup>7</sup> Leake, 2d ed. 636; Carlos v. Fancourt, 5 T. R. 482; Hill v. Halford, 2 B. & P. 413; Robins v. May, 11 A. & E. 213; Dodge v. Emerson, 34 Me. 96; Cook v. Satterlee, 6 Cow. 108; Reeside v. Knox, 2 Whart. 233; Dyer v. Covington, 19 Penn. St. 200.

<sup>8</sup> McCormick v. Trotter, 10 S. & R. 94; Wright v. Hart, 44 Penn. St. 454.

<sup>9</sup> Munger v. Shannon, 61 N. Y. 251; Gillespie v. Mather, 10 Barr, 28.

<sup>10</sup> *Supra*, § 308.

that an agreement may be made inoperative on the happening of a contingency; *e. g.*, when a contractor reserves the right to abandon boring for coal in case he should find "what is known as conglomerate or iron stone before he reaches 300 feet."<sup>1</sup>

## IV.—PERFORMANCE.

§ 601. An affirmative condition is regarded as performed when the thing contemplated by the party imposing it as such occurs in the way that party prescribes. A negative condition is to be regarded as performed when the thing contemplated by the party imposing it as such is either shown not to have existed or occurred within the limits designated, or to be incapable of occurring or existing. In the Roman law, when the condition was that a particular person should not do a particular thing, and this thing was one he could do at any time during life, the non-fulfilment of the condition could not be shown until death.<sup>2</sup> In our own law we have illustrations of conditions of this class in cases in which estates are limited on the death of parties of whose whereabouts nothing is known.<sup>3</sup> Of conditions based upon the non-happening of events requiring certain bodily aptitudes to insure them we have illustrations in estates limited on capacity for child-bearing, which, with women, is supposed to cease at fifty-five years.<sup>4</sup> In what way the condition is to be specifically fulfilled is to be determined from the terms of the contract.<sup>5</sup> When, however, a party claims to recover on the ground of having performed a condition precedent, the burden of proving such performance is on him;<sup>6</sup> and the performance must be satisfactorily established.<sup>7</sup> The performance of the

<sup>1</sup> *Lambert v. Fuller*, 88 Ill. 260.

<sup>2</sup> § 4. I. de V. O. (3, 15); I. 73 D. de cond. (35, 1).

<sup>3</sup> Wh. on Ev. §§ 1274 *et seq.*; see *Finlay v. King*, 3 Pet. 376; *Decorah Bank v. Haug*, 52 Iowa, 538.

<sup>4</sup> Wh. on Ev. § 1300. As to divisibility of performance, see *infra*, § 899.

<sup>5</sup> *Windscheid*, § 92; *Stockton Soc. v. Hildreth*, 53 Cal. 721. As to con-

struction, see *supra*, §§ 553 *et seq.*; *infra*, §§ 624 *et seq.*

<sup>6</sup> *Johnson v. Reed*, 9 Mass. 78; *Dana v. King*, 2 Pick. 155; *Albany Church v. Bradford*, 8 Cow. 457; *Decorah Bank v. Haug*, 52 Iowa, 538; see Wh. on Ev. § 353.

<sup>7</sup> *Jones v. U. S.*, 96 U. S. 24; *Dana v. King*, 2 Pick. 155; *Albany Dutch Church v. Bradford*, 8 Cow. 457; *Levy v. Burgess*, 64 N. Y. 390.

condition must be in the mode stipulated, unless the mode be modified by agreement.<sup>1</sup> An impossible condition precedent precludes a contract from becoming operative.<sup>2</sup>

§ 602. In the Roman law an unfulfilled condition is considered as fulfilled whenever the party to be benefited by the condition releases its performance: "quotiens per eum, cujus interest conditionem impleri, fit quo impleatur."<sup>3</sup> The same view was taken in England in 1787, by Ashurst, J., who in an opinion of the court of king's bench said, that when the promisee dispenses with the performance of the condition, this "is equal to performance."<sup>4</sup>

Fiction of fulfilment of condition when party benefited releases.

§ 603. The same rule obtains when the party to be benefited by the non-performance of a contract prevents the happening of the condition. In the Roman law the rule is thus stated: "Jure civile receptum est, quotiens per eum, cujus interest conditionem non impleri, fiat, quo minus impleatur, perinde haberi ac si impleta conditio fuisset."<sup>5</sup> A party cannot in this way take advantage of his own wrong.<sup>6</sup> "The conduct of one

And so when such party prevents fulfilment.

<sup>1</sup> *Supra*, § 558; *Savage Man. Co. v. Armstrong*, 19 Me. 147; *Willington v. Boylston*, 4 Pick. 101; *Hunt v. Livermore*, 5 Pick. 395; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Albany Dutch Church v. Bradford*, 8 Cow. 457; *Cole v. Hester*, 9 Ired. 28; *Stockton Soc. v. Hildreth*, 53 Cal. 721. See, as to performance of contracts, *infra*, § 898.

<sup>2</sup> *Supra*, § 547.

<sup>3</sup> *Savigny*, op. cit. 138, citing I. 5, § 5, quando dies (36, 2).

<sup>4</sup> *Hotham v. E. I. Co.*, 1 T. R. 645; adopted in *Benj. on Sales*, 3d Am. ed. § 567, citing also *Pontifex v. Wilkinson*, 1 C. B. 75; *Armitage v. Insole*, 14 Q. B. 728; *Laird v. Pim*, 7 M. & W. 474; *Cort v. R. R.*, 17 Q. B. 127; *Smith v. Lewis*, 26 Conn. 110; *Grove v. Donaldson*, 15 Penn. St. 128; *Kugler v. Wiseman*, 20 Ohio, 361; *Follansbee v. Adams*, 86 Ill. 13. As to releases, see *infra*, § 1031 *et seq.*

<sup>5</sup> L. 161 de R. J. (50, 17) and other citations in *Savigny*, op. cit. 140.

<sup>6</sup> See *supra*, §§ 312, 579; *infra*, §§ 716, 747, 901, and citations in *Windscheid*, § 92; *Benj. on Sales*, § 566; *Hotham v. E. I. Co.*, 1 T. R. 645; *Holme v. Guppy*, 3 M. & W. 387; *Armitage v. Insole*, 14 Q. B. 728; *Frost v. Knight*, L. R. 7 Ex. 111; *Mackay v. Dick*, L. R. 6 Ap. Ca. 251; *Williams v. Bank*, 2 Pet. 102; *Webb v. Stone*, 24 N. H. 288; *Webster v. Coffin*, 14 Mass. 196; *Miller v. Ward*, 2 Conn. 494; *Burtis v. Thompson*, 42 N. Y. 246; *Howard v. Daly*, 61 N. Y. 370; *Risley v. Smith*, 64 N. Y. 576; *Homer v. Ins. Co.*, 67 N. Y. 478; *Marie v. Garrison*, 83 N. Y. 14; *Lawrence v. Miller*, 86 N. Y. 131; *Winch v. Ice Co.*, 86 N. Y. 618; *Kline v. Cutter*, 34 N. J. Eq. 329; *Johnson v. Somerville*, 33 N. J. L. 152; *Grove v. Donaldson*, 15 Penn. St. 128;

party to a contract which prevents the other from performing his part is an excuse for non-performance.<sup>1</sup> Hence, where a covenantee prevents the performance of a covenant, this is a defence for the covenantor on a suit for the performance of the covenant.<sup>2</sup> But, as has already been seen, one party cannot rescind a contract on account of the failure of the other party to perform a condition precedent without on his part doing equity;<sup>3</sup> nor can a party sue on a *quantum meruit*, on part performance, treating the contract as rescinded in consequence of prevention of full performance on the other side, and sue also for damages under the contract.<sup>4</sup> But that in case of prevention by one party of an entire fulfilment by the other, the latter may sue on a *quantum meruit* for the price of the part performance is well settled.<sup>5</sup>—The practice in case of rescission is considered in a subsequent section.<sup>6</sup>

§ 604. A promisee cannot insist on the non-performance of a condition precedent when that non-performance is imputable to himself.<sup>7</sup> Thus, in the familiar case of a sale of goods to be paid for on delivery, if the purchaser notifies the vendor that he refuses to accept the goods, this relieves the vendor from the condition precedent of delivering the goods;<sup>8</sup> and such, also, is the case where the vendor is asked by the purchaser not to deliver, or to postpone the delivery (though a default in delivery is not cured by a

Kugler *v.* Wiseman, 20 Ohio, 361; Lowry *v.* Barelli, 21 Oh. St. 324; Swift *v.* Dewy, 37 Oh. St. —; Jones *v.* R. R., 14 W. Va. 514; Reynolds *v.* R. R., 11 Neb. 186; Crump *v.* Mead, 3 Mo. 233; Aller *v.* Pennell, 51 Iowa, 537; Smith *v.* Wheeler, 7 Oregon, 49; and cases cited *infra*, § 712; *supra*, § 312. That a party by disabling himself may make himself at once liable, see *infra*, § 885 *a*.

<sup>1</sup> Bradley, J., Peck *v.* U. S., 102 U. S. 65.

<sup>2</sup> Borden *v.* Borden, 5 Mass. 67; Marshall *v.* Craig, 1 Bibb, 379; Shaw *v.* Hurd, 3 Bibb, 372.

<sup>3</sup> *Supra*, § 285.

<sup>4</sup> Hill *v.* Green, 4 Pick. 114.

<sup>5</sup> *Supra*, § 579; *infra*, §§ 712, 719.

<sup>6</sup> *Infra*, § 919; and see *supra*, §§ 282 *et seq.*

<sup>7</sup> *Supra*, §§ 312, 325; *infra*, §§ 891, 901, 945; Leake, 2d ed. 666; Benj. on Sales, 2d Am. ed. § 566; Cooper *v.* Mowry, 16 Mass. 7; Betts *v.* Perrine, 14 Wend. 219; Whitney *v.* Spencer, 4 Cow. 39; Haden *v.* Coleman, 73 N. Y. 567; Swift *v.* Dewy, 37 Oh. St. —; Crump *v.* Meas, 3 Mo. 233; see Brown *v.* Slee, 103 U. S. 828; and see cases cited *supra*, § 559; as to release, see *infra*, §§ 1031 *et seq.*

<sup>8</sup> Ripley *v.* McClure, 4 Ex. 345; Fitt *v.* Cassanet, 4 M. & G. 898. See Jackson *v.* Crysler, 1 John. Cas. 125; see *infra*, §§ 994–5.

subsequent request not to deliver);<sup>1</sup> and where performance on a later day is accepted as a substitute for performance on a prior day;<sup>2</sup> and where on a contract to manufacture and deliver goods, the vendor is notified by the purchaser that he has changed his mind and will not accept the goods when ready.<sup>3</sup> A waiver, however, is not to be implied from silence, unless the silence be of a party whose duty was at the time to speak.<sup>4</sup> But performance of a particular thing is waived by the acceptance of a substitute for such particular thing;<sup>5</sup> and this is the case with the waiver of conditions precedent in insurance.<sup>6</sup> It should be added, that a party cannot enforce a performance upon the refusal of the other party to perform, and then rely on such non-performance as a ground for rescinding the contract.<sup>7</sup>—The intention to waive must be established by language and conduct, and not by speculation as to intention.<sup>8</sup>

§ 605. On a contract for labor, although the work, when a specific job, is to be completed as a condition precedent before payment,<sup>9</sup> yet if the employer prevents the completion of the job, he becomes liable to the employee for damages for breach of contract.<sup>10</sup> And, where the plaintiff agreed to build a barn for a fixed price, the defendant to supply the materials, it was held that where the barn was not completed in consequence of the defendant's failure to supply the materials, the plaintiff was entitled to recover for part performance.<sup>11</sup> But as a general rule, "where the plaintiff himself is

On contracts of labor employee prevented by employer from working may recover.

<sup>1</sup> *Plevins v. Downing*, L. R. 1 C. P. 220. *Hartford Ins. Co. v. Davenport*, 37 Mich. 609.

<sup>2</sup> *Warren v. Mains*, 7 Johns. 476.

<sup>7</sup> *Selway v. Fogg*, 5 M. & S. 83;

<sup>3</sup> *Cort v. R. R.*, 17 Q. B. 127; *Frost Allen v. Webb*, 24 N. H. 278.

<sup>8</sup> *West v. Platt*, 127 Mass. 367.

<sup>4</sup> *Gray v. Blanchard*, 8 Pick. 292.

<sup>9</sup> *Infra*, §§ 716 *et seq.*; *Leake*, 2d ed.

<sup>5</sup> *Porter v. Stewart*, 2 Aiken, 427; 667; *Peeters v. Opie*, 2 Wms. Saun. 346; *Morton v. Lamb*, 7 T. R. 130.

*Warren v. Mains*, 7 Johns. 476; see 10 *Pontifex v. Williamson*, 1 C. B. 75; *Planché v. Colburn*, 8 Bing. 14;

*Flannery v. Rohrmayer*, 46 Conn. 558; see *supra*, § 559; *infra*, §§ 994–5. *Moulton v. Trask*, 9 Met. 577; *Hall v. Bennett v. Ins. Co.*, 81 N. Y. 273; *Rupley*, 10 Barr, 231.

<sup>11</sup> *Hall v. Rupley*, 10 Barr, 231.

to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do."<sup>1</sup> And as will be hereafter seen,<sup>2</sup> when a term of service is broken into by the employer, the employee may recover on a *quantum meruit*. It will be also seen, that the duration of a term of service, when not limited in writing, is determined by the facts of the particular case, as modified by local usage.<sup>3</sup>

§ 606. A party who disables himself from performing a contract cannot set up in defence to a suit on it a technical default by the other party subsequent to the occurrence of the disability.<sup>4</sup> Thus when, after a contract for the sale of goods to be delivered when requested by the purchaser, the vendor sold the goods to a third party, it was held that to subject the vendor to liability to the purchaser it was not necessary that the purchaser should have requested delivery;<sup>5</sup> nor when one party has disabled himself absolutely from performing his part of the contract need the other party even tender to perform his part in order to bring suit.<sup>6</sup> A man, who, when engaged to be married to one woman, marries another, cannot, to a suit for breach of promise brought against him by the first, set up the want of a request to him to marry;<sup>7</sup> and generally after an agreement to sell real estate to A. upon certain conditions precedent, an absolute sale to B. relieves A.

Party disabling himself cannot set up technical default by other party.

<sup>1</sup> Note to *Peeters v. Opie*, *ut supra*.

<sup>2</sup> *Infra*, § 716.

<sup>3</sup> *Infra*, §§ 612, 717 *et seq.*

<sup>4</sup> *Infra*, §§ 712-16; *supra*, §§ 312, 325; *Kerrison v. Cole*, 8 East, 231; *Avery v. Boden*, 5 E. & B. 714; *Cort v. R. R.*, 17 Q. B. 127; *Caines v. Smith*, 15 M. & W. 189; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Heard v. Lodge*, 20 Pick. 53; *Smith v. Lewis*, 24 Conn. 624; 26 Conn. 110; *Stewart v. Keteltas*, 36 N. Y. 388; *Fleming v. Potter*, 7 Watts, 380; *Law v. Henry*, 39 Ins. 414; see *Denby v. Graff*, 10 Ill. Ap. 195, and see *infra*, §§ 885 *a*, 995, for other cases.

<sup>5</sup> *Bowdell v. Parson*, 10 East, 359; *Amory v. Brodrick*, 5 B. & Ald. 712; *infra*, §§ 994-5.

<sup>6</sup> *Clark v. Crandalls*, 3 Barb. 600; *supra*, §§ 575 *et seq.*

<sup>7</sup> *Supra*, § 575; *Short v. Stone*, 8 Q. B. 358; *Freath v. Burr*, L. R. 9 C. P. 208; *Caines v. Smith*, 15 M. & W. 189; *Wagonseller v. Simmers*, 97 Penn. St. 465, and cases *supra*, §§ 324, 575; see *Harrison v. Cage*, 1 Ld. Ray. 387. That his incapacity is no defence to a suit for damages, see *supra*, § 324. That a contract to marry must be to marry in a reasonable time, see *infra*, § 882.



from proving that the conditions precedent had not been performed by him, provided there was no default on his part prior to the sale to B.<sup>1</sup> A promisor, also, prevented by the interference of the promisee from completing his contract may recover for part performance, though the contract was entire.<sup>2</sup>—An employer who refuses to give notes, as required by the contract of employment, is suable at once on *quantum meruit*.<sup>3</sup>—Whenever, in other words, there are concurrent conditions, neither party can sue without showing that he was ready and willing to perform, or that performance on his part was prevented or waived by the other party.<sup>4</sup> “The plaintiff,” as was said by Storrs, C. J., in a well-considered case in Connecticut,<sup>5</sup> “in order to sustain this action, need only to show that he did what the law required of him; and all that it required was that he should be ready and willing to perform on his part if the defendant was also ready to perform on his.” “Some misapprehension or confusion appears to have arisen from the mode of expression used in the books in treating of the necessity of a tender or offer by the parties as applicable to the case of mutual and concurrent promises. The word ‘tender,’ as used in such a connection, does not mean the same kind of offer as when it is used in reference to the payment or offer to pay an ordinary debt due in money, where the money is offered to a creditor who is entitled to receive it, and nothing further remains to be done, but the transaction is completed and ended; but it only means a readiness and willingness accompanied with an ability on part of one of the parties, to do the acts which the agreement requires him

<sup>1</sup> Leake, 2d ed. 668; Main’s case, 5 Co. 20 b; Lovelock v. Franklyn, 8 Q. B. 371.

<sup>2</sup> Hill v. Hovey, 26 Vt. 109; Wilhelm v. Caul, 2 Watts & S. 26; *infra*, §§ 714 *et seq.* That an employer cannot set up a failure in service induced by himself as a defence to a suit by the employee, see *infra*, §§ 716 *et seq.* That a *quantum meruit* lies in cases of failure on defendant’s part to perform condition precedent, see *infra*, §§ 707 *et seq.*

<sup>3</sup> Brown v. Foster, 51 Penn. St. 165.

<sup>4</sup> *Supra*, § 558; Giles v. Giles, 9 Q. B. 164; Atkinson v. Smith, 14 M. & W. 695; Bankart v. Bowers, L. R. 1 C. P. 484; Howe v. Huntington, 15 Me. 350; and cases cited in prior notes to this section and to § 558. For other cases see *infra*, §§ 994–5.

<sup>5</sup> Smith v. Lewis, 26 Conn. 110; see 2 Ch. on Cont. 11th Am. ed. 1085, where this opinion is given at length.

to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness. Such readiness, ability, and notice are sufficient evidence of, and indeed constitute and imply, an offer or tender in the sense in which those terms are used in reference to the kind of agreement we are now considering. It is not an absolute unconditional offer to do or transfer anything at all events, but it is in its nature conditional only, and dependent on, and to be performed only in case of, the readiness of the other party to perform his part of the agreement."—The distinctive rules with regard to divisibility of performance are considered in other sections.<sup>1</sup>

§ 607. When there is a substantial performance of a condition precedent, the agreement, if the condition is divisible, will be enforced *pro tanto*.<sup>2</sup> Thus, where a ship-owner contracted to load a full cargo and deliver it on payment of freight, but sailed with only a partial cargo, it was held that, supposing the loading to be a condition precedent, yet, as the condition was divisible, a suit might be maintained for freight *pro rata* on the goods carried.<sup>3</sup> Where it was a condition precedent in a contract for the sale of a business that the profits should appear by the books to amount to a certain sum per week, the purchase money to be paid by instalments, it was held, after the purchaser had taken possession of the business and carried it on until all the instalments were due, that he could not set up as a bar to a suit for the purchase money that the profits fell below the figure designated in the agreement.<sup>4</sup> And where, even though the contract is entire, entire per-

<sup>1</sup> See *supra*, §§ 190, 601; *infra*, §§ 898 *et seq.*

<sup>2</sup> Leake, 2d ed. 664; Benj. on Sales, 3d Am. ed. § 564; *Ellen v. Topp*, 6 Ex. 441; *Havelock v. Geddes*, 10 East, 563; *Bradford v. Williams*, L. R. 7 Ex. 260; *Stanton v. Richardson*, L. R. 7 C. P. 421; *Divinal v. Howard*, 30 Me. 258; *Holden Steam Mill Co. v. Westervelt*, 67 Me. 446; *Maryland Fertilizing Co. v. Lorentz*, 44 Md. 418; *McGrath v.*

*Herndon*, 4 T. B. Mon. 480. As to performances generally, see *infra*, §§ 867 *et seq.*

<sup>3</sup> *Ritchie v. Atkinson*, 10 East, 295; *Roberts v. Havelock*, 3 B. & Ad. 404; see *Heilbutt v. Hickson*, L. R. 7 C. P. 450. As to divisibility of conditions, see *supra*, § 552. As to other cases of divisibility, see §§ 338, 511, 899.

<sup>4</sup> *Pust v. Dowie*, 5 B. & S. 20.

formance by one party is prevented by the interference of the other, the value of what has been done can be recovered on a *quantum meruit*.<sup>1</sup> "It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less. This is no objection to the soundness of the rule, which has been much acted on. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract."<sup>2</sup>—But while substantial performance of a condition is essential, such performance must be proved by the party setting it up.<sup>3</sup>—A condition whose performance is of no possible value whatever to the promisee need not be performed.<sup>4</sup>

#### V. CONDITIONS SUBSEQUENT.

§ 608. A condition subsequent is a limitation of title so that it will be divested on the happening of a future contingent event. The term title is used in a general sense, and includes title to labor, and title to personal property, as well as title to land.<sup>5</sup> By a condition precedent, it should be remembered, a duty is created;

Conditions subsequent divest title, but not in favor of strangers.

<sup>1</sup> *Supra*, §§ 603 *et seq.*; *infra*, § 714; *Blood v. Enos*, 12 Vt. 625; *Champlin v. Rowley*, 18 Wend. 187; *Wilhelm v. McCall*, 2 Watts & S. 26.

<sup>2</sup> *Per cur.* in *Ellen v. Topp*, 6 Ex. 441. In *Raymond v. Minton*, L. R. 1 Ex. 244, it was held that a master would not be liable for not teaching an apprentice when the apprentice would not be taught. See *infra*, § 613.

<sup>3</sup> *Wh. on Ev.* §§ 353 *et seq.*; *Penn. Life Ins. Co. v. Dovey*, 64 Penn. St. 260; *Newman v. Perrill*, 73 Ind. 153; *Cheraw, etc. R. R. v. White*, 14 S. C. 51; and see cases *supra*, §§ 558, 606.

<sup>4</sup> *Emerson v. Graff*, 29 Penn. St. 358.

<sup>5</sup> See *supra*, §§ 545 *et seq.*; *infra*, § 1039; and see *Elliott v. Blake*, 1 Lev. 88; *Poussard v. Spiers*, L. R. 1 Q. B. D. 410; *Cowell v. Springs Co.*, 100 U. S. 55; *Rowell v. Jewett*, 69 Me. 293; *Randall v. Marble*, 69 Me. 310; *Wells v. Calnan*, 107 Mass. 514; *Brigham v. Shattuck*, 10 Pick. 309; *Dresser Man. Co. v. Waterston*, 3 Met. 9; *Osborn v. Jernegan*, 126 Mass. 362; *Keening v. Ayling*, 126 Mass. 404; *Goodell v. Fairbrother*, 12 R. I. 233; *Knight v. R. R.*, 70 Mo. 231; *McClelland v. Nichols*, 24 Minn. 176.

by a condition subsequent, a duty is extinguished. A condition precedent is put in evidence by the plaintiff in order to establish his right to sue; a condition subsequent is put in evidence by the defendant for the purpose of showing why he should not be sued. But while this is the general rule, "it is possible for an obligation to be extinguished by a condition subsequent before the time for performing the obligation arrives, and hence before any right of action accrues. Yet, if an action be brought after the time for performance arrives, the plaintiff will be able to state and prove facts which will entitle him to recover, unless the defendant sets up and proves his defence arising from the condition subsequent."<sup>1</sup>—It is also to be observed, as is elsewhere more fully shown,<sup>2</sup> that so far as concerns the reason of the thing, the distinction between conditions precedent and conditions subsequent is purely artificial. There is no condition that is not in one aspect precedent and in another aspect subsequent.—That a stranger cannot take advantage of a breach of a condition subsequent, springs from the very nature of contracts;<sup>3</sup> and as a stranger, so far as concerns the right to insist on a broken covenant on land, is to be considered an heir of the grantor when such heir has no interest which would be served by the exaction of the forfeiture. Thus, in a case in Michigan in 1881, the plaintiff sought to take advantage of a condition in a deed that no intoxicating liquors should be sold on the premises. "May an owner of lands," said Marston, C. J., "when conveying the same, insert such conditions subsequent as his fancy may dictate, and upon a breach thereof insist upon a forfeiture of the estate, although such breach in no way tends to his prejudice? May he insert a condition that even an objectionable business shall not be carried on upon the premises; or that a particular use of the premises, and none other, shall be made; or if any violation of the laws of the land occur thereon, as an assault and battery, that the estate shall be forfeited and that he may thereupon re-enter and become owner thereof? Upon what principle could such conditions be enforced, other than

<sup>1</sup> Langdell, Cases on Cont. ii. 1002.

<sup>3</sup> See *infra*, § 784.

<sup>2</sup> *Supra*, § 551.

that as mere owner he had a right to insert any conditions which the grantee would accept? If this right exists, then conditions in restraint of trade, and that would tend to prevent alienation of the property, may be inserted at pleasure, and the courts be called upon to enforce the same. The right to insert conditions, like the one in this case, we do not question, where it appears that the grantor has a special interest in the enforcement thereof. An owner of real estate, when conveying a part thereof, may undoubtedly impose conditions, which, if reasonable, courts would, by an appropriate remedy, restrain and prevent the violation thereof, for the protection of the grantor and his privies in estate, certainly so long as the reasons which gave rise to the condition still existed. Nothing, however, of this kind exists in the present case. It does not appear that the plaintiffs, at the time of the conveyance or since then, owned any other lands in the village or vicinity of Otsego, or that they resided in the village or vicinity, or had in any way a special interest in the enforcement of this condition.”<sup>1</sup>

§ 609. When property is vested in A. subject to a condition subsequent that on the happening of a certain contingency it is to revert to B., the burden is on B. to show that the property has thus reverted. “*Prima facie*, every contract is permanent and irrevocable, and it lies upon a person who says it is revocable or determinable to show either some expression in the contract itself, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination.”<sup>2</sup>—Yet the question is complicated by the circumstances just mentioned, that a condition is in one aspect a condition precedent; in another aspect a condition subsequent. In such case we must hold that the burden is on the actor; *i. e.*, on the party seeking to establish a point.<sup>3</sup>

Burden is on party setting up devolution of property by condition subsequent.

<sup>1</sup> Barrie v. Smith, Sup. Ct. Mich. 1881.

<sup>2</sup> James, L. J., Llanelly R. R. v. London R. R., L. R. 8 Ch. 949; Duncan v. Findley, 6 S. & R. 235.

<sup>3</sup> Wh. on Ev. § 353; Cage v. Acton, 1 Ld. Ray. 515; Gray v. Gardner, 17 Mass. 188.

§ 610. Ordinarily, as we have seen, a breach of warranty does not give a right to rescind except in case of fraud or of honest misapprehension.<sup>1</sup> The parties, however, may agree that on breach of warranty the goods may be returned, and the contract rescinded, though the right is usually limited to a specific time, after which the right to claim rescission ceases to exist even as to latent defects not detected until after that period.<sup>2</sup>

§ 611. As we have already seen, when there is a contract of "sale or return," the intention being that the purchaser shall take the property with a right to return within a certain limit, the title vests in the purchaser, the condition being a condition subsequent.<sup>3</sup>

§ 612. The right to determine contracts of service depends upon the terms of the particular contract interpreted by usage.<sup>4</sup> That a contract may be made to terminate and a forfeiture imposed on the decision of an architect or other referee has been already shown.<sup>5</sup>

§ 613. In an indenture of apprenticeship, the master's covenant to teach the apprentice is conditioned on the apprentice's willingness to learn, while the apprentice's covenant to serve is conditioned on the master's willingness to direct and teach. If the apprentice deserts or refuses to learn, defying or escaping the master, this relieves the master from his covenant;<sup>6</sup> though mere misconduct on the part of the apprentice, not amounting to

<sup>1</sup> See *supra*, §§ 214, 282; Gompertz v. Denton, 1 C. & M. 207; Head v. Tattersall, L. R. 7 Ex. 7; Thornton v. Wynn, 12 Wheat. 192; Scranton v. Trading Co., 37 Conn. 130; Voorhees v. Earl, 2 Hill, 288.

<sup>2</sup> *Smart v. Hyde*, 8 M. & W. 723; *Chapman v. Gwyther*, L. R. 1 Q. B. 463; see *Bryant v. Isburgh*, 13 Gray, 607.

<sup>3</sup> *Supra*, § 589.

<sup>4</sup> *Infra*, § 718; *Leake*, 2d ed. 673; *Baxter v. Nurse*, 6 M. & G. 938; 1 C. &

K. 10; *Fairman v. Oakford*, 5 H. & N. 635. The conditions on which such contracts may be terminated, and the effect of such termination are hereafter distinctively discussed. *Infra*, §§ 716-718.

<sup>5</sup> *Supra*, § 594; *Faunce v. Burke*, 16 Penn. St. 469.

<sup>6</sup> *Leake*, 2d ed. 663; *Hughes v. Humphreys*, 6 B. & C. 680; *Rayment v. Minton*, L. R. 1 Ex. 244; *supra*, § 323. See *Blunt v. Melcher*, 2 Mass. 228; *Holbrook v. Bullard*, 10 Pick. 68.

refusal to be taught, does not relieve the master from the duty of teaching, though it may subject the apprentice to a cross-action, or, under our practice, to a set-off for damages, should he sue the master for failure in the latter's covenants.<sup>1</sup> The apprentice's covenant to serve is conditioned on the master's readiness to direct and teach.<sup>2</sup> And in either case performance is excused by absolute incapacity produced by sickness or other necessity.<sup>3</sup>

§ 614. Deeds of separation between husband and wife remain in force only while the parties live apart, and cease to be operative when they resume cohabitation;<sup>4</sup> though, when the deed by its own terms is to remain in force until there be a written consent to resume cohabitation, it is not avoided by cohabitation without written consent.<sup>5</sup> And a deed projected to meet an intended separation which never took place is void *ab initio*.<sup>6</sup>—As has been already seen, agreements modifying the marriage relations are void as against the policy of the law.<sup>7</sup>

Deeds of separation between husband and wife are revoked upon renewed cohabitation.

§ 615. It is customary to insert in leases stipulations that, in case of non-discharge by the lessee of certain duties (*e. g.*, paying of rent, repairing), the lease is to be forfeited. These stipulations are for the benefit of the lessor, and cannot, therefore, be set up by the lessee as ground for avoidance of the lease.<sup>8</sup>—The lessor waives a forfeiture by acceptance of rent or other ratification of the tenancy after the forfeiture has occurred;<sup>9</sup> and hence, in

Forfeitures may be waived.

<sup>1</sup> Leake, 2d ed. 664; Winstone v. Linn, 1 B. & C. 460; Phillips v. Clift, 4 H. & N. 168. It is otherwise when the indenture provides that misbehavior on part of the apprentice shall avoid the contract. Westwick v. Theodor, L. R. 10 Q. B. 224.

<sup>2</sup> Ellen v. Topp, 6 Ex. 424.

<sup>3</sup> Boast v. Firth, L. R. 4 C. P. 1, cited *supra*, §§ 300, 321, 323.

<sup>4</sup> Pollock, 273; Hindley v. Westminster, 6 B. & C. 200; Webster v. Webster, 4 D. M. & G. 437; Ruffles v. Alston, L. R. 19 Eq. 539.

<sup>5</sup> Randle v. Gould, 8 E. & B. 457.

<sup>6</sup> Bindley v. Mulloney, L. R. 7 Eq. 343.

<sup>7</sup> *Supra*, § 394.

<sup>8</sup> Leake, 2d ed. 671; Rede v. Farr, 6 M. & S. 121; Arnsby v. Woodward, 6 B. & C. 519; Jones v. Carter, 15 M. & W. 718. See Garnhart v. Finney, 40 Mo. 449.

<sup>9</sup> Dendy v. Nicholl, 4 C. B. N. S. 376; Toleman v. Portbury, L. R. 6 Q. B. 245.

order to avoid the lease on ground of forfeiture, he must notify the tenant, or do some other act showing that he holds the lease to be terminated. The same rule obtains with regard to other defeasible conveyances. Thus in a case, already cited, in Michigan in 1881, the evidence was that the plaintiffs conveyed certain lots in the village of Otsego Lake by warranty deed, subject to the condition that if the grantees, their heirs or assigns, should sell, or knowingly permit another to sell or keep for sale, intoxicating liquors, on the premises, the estate thereby conveyed should cease and revert to the grantors. It was shown that defendant, a subsequent grantee, had sold intoxicating liquors on the premises. The defendant introduced evidence tending to show that intoxicating liquors had been sold on the premises with the knowledge and consent of the plaintiffs, and it was held that this, if proved, was a waiver.<sup>1</sup> And, independently of the question of waiver, conditions limiting the alienability of land cannot, as we have seen, be enforced unless by parties retaining an interest in the adjacent lands.<sup>2</sup>

§ 616. The happening of a condition subsequent (auflösende Bedingung) causes the title at once to revert to the party to whom it is limited. The reversioner has a right, on the condition occurring, to resume possession; and according to the Roman law, he has an immediate title to the thing, not merely a claim

On happening of condition subsequent title at once reverts.

<sup>1</sup> "It is well settled," said Marston, C. J., "that a condition subsequent may be waived, where broken, by the party who has the right to avail himself of it, and this may be proven, as well by acts and conduct as by an express agreement, and where once waived it is gone forever. If, therefore, it appeared that the grantor of the defendant had used these premises or the buildings thereon for the purpose of selling intoxicating liquors therein, to the knowledge of the plaintiffs, or either of them, and the defendant subsequently purchased the premises, and made valuable improvements thereon without objection, or

any steps being taken by the plaintiffs to insist upon a forfeiture, this would constitute a waiver of the condition and forfeiture. *Gray v. Blanchard*, 8 Pick. 284. That the plaintiffs could waive the condition there can be no question, and, if they permitted the premises to be used in violation thereof, they could not stand by, see the property change hands, and, after valuable improvements had been made thereon, then step in, insist upon a forfeiture, and thus acquire the improvements made upon the strength of their seeming acquiescence." *Barrie v. Smith*, Sup. Ct. Mich. 1881.

<sup>2</sup> *Ibid.*; *supra*, § 608.



against a person.<sup>1</sup> According to our own law, on breach of a condition subsequent the property reverts to the grantor.<sup>2</sup> Hence, a settlement by a father of four thousand dollars on a married daughter, with a provision, that the money should revert to him should she die in an approaching confinement, has been held to give a vested right to her father to the reversion upon her death taking place at such confinement.<sup>3</sup>—Whether the condition reverts is a matter of law when there are no disputed facts. Thus, in a case decided in Wisconsin, in 1881,<sup>4</sup> a “reaper and self-binder” was delivered to a conditional purchaser in July, and used in the harvest of that season, and found defective. In January or February following, the vendor’s agent called on the purchaser in relation to payment for the machine, and the purchaser said he would give nothing for it; but he still kept it and did not offer to return it until the following April. It was held that as a matter of law, the machine was not returned in reasonable time, and judgment should be entered for the value. In such cases it was said, the question may be treated as one of law, and passed upon by the court without any encroachment upon the province of the jury.<sup>5</sup>—The title that reverts, however, may be merely a title not to be sued. Thus, an insurance policy may

<sup>1</sup> Windscheid, § 90.

<sup>2</sup> *Cowell v. Spring Co.*, 100 U. S. 55. In this case there was a condition in a deed of land, avoiding it in case intoxicating liquors should be sold in any place of public resort on it. It was held that on breach of the condition, the grantor had a right to treat the estate as reverted.—Where a deed conveyed a strip of land to a railroad company, to them, their successors, and assigns, forever, “provided always, and this deed is upon the express condition,” that a certain system of drainage was to be kept up by the railroad company, it was ruled that this created a condition subsequent, voidable by the grantor upon condition broken; but that no action for recovery of the land could be brought

by the grantor until he had made entry upon the land after condition broken, or made claim, if entry was impossible. *Hammond v. R. R.*, 15 S. C. 10.

<sup>3</sup> *Herrington v. Robertson*, 71 N. Y. 280; and see *Westenberger v. Reist*, 13 Penn. St. 594.

<sup>4</sup> *Gammon v. Abrams*, 53 Wis. 323; as cited in 25 Alb. L. J. 137.

<sup>5</sup> The court cited 1 Greenl. Ev. § 49, and notes; *Williams v. Porter*, 41 Wis. 423; *Hutchinson v. Chicago*, etc. R. Co., 41 id. 542; *Berg v. Chicago*, etc., R. Co., 50 id. 419. See, also, *Lemke v. Chicago*, etc., R. Co., 39 Wis. 450; *Boothby v. Scales*, 27 id. 626; 2 Sedg. Damages, 173; *Vaughn v. Howe*, 20 Wis. 497.

provide, that unless a suit be brought within a year after death the insured's policy is to be forfeited; and in such case, when the year expires, the title of the insurer to immunity is established.<sup>1</sup>

§ 617. Under a conditional sale, a title passes which, though defeasible, is attachable by the vendee's creditors. Thus in an action for trover in Massachusetts, in 1881, for the conversion of a mowing machine, the evidence was, that the plaintiffs sold the machine to C. in June, 1879, upon the condition that he should pay one half of the price on August 15, and the other half on September 20, of the same year, and that the machine should be the property of the plaintiffs until paid for. The defendant, a deputy sheriff, attached the machine as the property of C. on July 9, and sold it on execution August 22, 1879. The plaintiffs' writ was dated July 28, 1879. At the trial in the superior court, a verdict was directed for the defendant, and, by agreement of the parties, the case was reported to the supreme judicial court. This was affirmed by the supreme court.—“The agreement between the plaintiffs and C.,” said Morton, J., “amounted to a conditional sale, liable to be defeated upon the non-performance of the conditions. C., after the delivery to him, had a rightful possession which the plaintiffs could not interfere with until a failure by him to perform the condition. He had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions.”<sup>2</sup> Even if the sale by the defendant without performing the condition made him a trespasser *ab initio*, so that the plaintiffs could at any time after the breach of the condition maintain trover against him; yet the difficulty is, that, at the time the plaintiffs commenced this suit, there had been no breach of the condition, and they had no right of possession. In order to maintain trover, a plaintiff must show that at the time he commences his suit he

Defeasible  
title passes  
to vendee.

<sup>1</sup> Semmes v. Ins. Co., 13 Wall. 158. Day v. Bassett, 102 Mass. 445; Currier

<sup>2</sup> Vincent v. Cornell, 13 Pick. 294; v. Knapp, 117 ib. 324.

has possession or a right to the immediate possession.<sup>1</sup> It follows that this action was prematurely brought, and that the ruling of the superior court was correct.”<sup>2</sup>

<sup>1</sup> *Winship v. Neale*, 10 Gray, 382;    <sup>2</sup> *Newhall v. Kingsbury*, 131 Mass.  
*Ring v. Neale*, 114 Mass. 111; *Hardy* 445.  
*v. Munroe*, 127 ib. 64.













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